125-693

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 3

J. P. AND Z. T. ADDINGTON, PLAINTIFFS IN ERROR,

vs.

GEORGE ADAMS, BURKE AND BROTHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED SEPTEMBER 5, 1892.

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OCTOBER TERM, 1885.

No. 272.

J. P. AND Z. T. ADDINGTON, PLAINTIFFS IN ERROR,

vs.

GEORGE ADAMS, BURKE AND BROTHER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 December Term, A. D. 1882.

MONDAY, *December 4th*, 1882.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the fifth circuit and northern district of Texas at the city of Dallas, in Dallas county, and said circuit and district on the 4th day of December, A. D. 1882, it being the first Monday in said month in said year, and the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; J. C. Bigger, United States attorney for said district; J. A. McKee, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

"*Original Petition.*"

In the Circuit Court of the United States for the 5th Judicial Circuit and Northern District of Texas, holding Sessions at Dallas, Texas.

GEORGE ADAMS, BURKE & BROTHER, Plaintiffs,
vs.
J. P. ADDINGTON *et al.*, Defendants. } Debt.

To the honorable court:

Your petitioners, George Adams, James C. Burke, and John C. Burke, all of whom are resident citizens of the city of Chi-
2 cago, in the State of Illinois, doing business under the firm name of George Adams, Burke & Brother, complaining of J. P. Addington, Z. T. Addington, Joseph Mulhall, and Samuel Scaling, would represent to the court that the said J. P. Addington and Z. T. Addington are both resident citizens of the county of Cooke, in the State of Texas, within said northern judicial district of Texas, holding sessions at Dallas, Texas, and that the said Joseph Mulhall and Samuel Scaling are both resident citizens of the city of St. Louis, in the State of Missouri, late partners in business under the firm name of Mulhall & Scaling; that heretofore, to wit, on the 8th day of November, 1880, the said J. P. Addington and Z. T. Addington made their certain promissory note in writing, bearing date on the day and year last aforesaid, and thereby promised to pay, seven months after date thereof, to Mulhall & Scaling, or order, at the office of Putman, Chambers & Co., in Gainsville, Texas, the sum of ten thousand eight hundred and ninety-one dollars and sixty-seven cents ($10,891$\frac{67}{100}$) for value received, with interest, at the rate of one per cent. per month after maturity until paid, and in case of legal proceedings on said note they further agreed to pay ten per cent. on the amount for attorneys' fees, and on the day and year aforesaid delivered said note to the said Mulhall & Scaling, who were then partners in business under said firm name, whereby they became liable and
3 promised the said Mulhall & Scaling to pay them, or order,

the sum of money in said note specified, according to the tenor and effect thereof.

Plaintiffs would further represent that, after the execution and delivery of said promissory note by the said J. P. Addington and Z. T. Addington to the said Mulhall and Scaling, to wit, on the — day of November, 1880, the said Mulhall and Scaling, for a valuable consideration to them in hand paid by plaintiffs, endorsed said promissory note by writing their firm name across the back of the same to these plaintiffs, whereby the said Mulhall & Scaling directed the contents of said promissory note then unpaid to be paid to plaintiffs or their order, according to the tenor and effect of said note and of their said endorsement, of all which the said defendants, J. P. Addington and Z. T. Addington, had notice, and thereby became liable, and promised the plaintiffs to pay them the sum of money in said note mentioned, according to the tenor and effect thereof and of said endorsement.

Plaintiffs would further represent that afterwards, when said promissory note became due and payable, to wit, on the 11th day of June, 1881, the same was duly presented to the said J. P. Addington and Z. T. Addington at the office of Putnam, Chambers, and Company, in Gainesville, Texas, and payment of the said sum of money, according to the tenor of said note, was then and there duly and legally required and demanded of said J. P. Addington
4 and Z. T. Addington and of each of them, who then and there refused to pay the same or any part thereof; of all which the said Mulhall & Scaling had legal notice by said note being duly protested according to law; which said promissory note and protest are hereto annexed and made a part of this petition. That by reason of the premises the said Mulhall and Scaling became liable and promised plaintiffs to pay them the sum of money in said note specified according to the tenor and effect thereof and of said endorsement. Yet, though often requested, said J. P. Addington, Z. T. Addington, Joseph Mulhall, and Samuel Scaling have not paid said sum of money or any part thereof, though the same is due and unpaid, but fail and refuse so to do, to plaintiffs' damage fifteen thousand dollars.

Plaintiffs would represent that they are the legal and equitable owners and holders of said note; that they paid the sum of four dollars protest fees on said note; that the defendants, Joseph Mulhall and Samuel Scaling, are not residents of the State of Texas; that the said J. P. Addington and Z. T. Addington have secreted their property for the purpose of defrauding their creditors; that the attachment is not sued out for the purpose of injuring or harassing the defendants, and the *the* plaintiffs will probably lose their debt unless such attachment is issued.

5 Wherefore plaintiffs bring suit, and pray that defendants be cited to answer this petition, and that a writ of attachment issue, and the same be levied on enough of defendants' property to make the amount of said debt, interest, attorneys' fees, protest fees, and all costs of suit, and on final hearing that they have judgment for their said debt, interest, attorneys' fees, protest fees,

and for costs of suit, and for the foreclosure of their said attachment lien; and they pray for such other relief as they may be entitled to in the premises.

(Signed) CRAWFORDS & SMITH,
Att'ys for Pl'ff.

Before the undersigned authority this day personally appeared James C. Burke, who upon oath says he is a member of the firm of George Adams, Burke & Brother, plaintiffs in this cause; that the matters set forth in the foregoing petition are true; that the defendants, J. P. Addington, Z. T. Addington, Joseph Mulhall, and Samuel Scaling, are justly indebted to plaintiffs in the sum of $10,891$\frac{67}{100}$ on note, besides $588.01 interest, and $1,089.10 attorney's fees, and $4.00 protest fees, amounting in all to $12,572$\frac{78}{100}$.

That said amount is now due and unpaid; that the defendants, Joseph Mulhall and Samuel Scaling, are not residents of the State of Texas; that the said J. P. Addington and Z. T. Addington have secreted their property for the purpose of defrauding their creditors; that the attachment is not sued out for the purpose of injur-
6 ing or harassing the defendants, and that the plaintiffs will probably lose their debt unless such attachment is issued.

(Signed) JAMES C. BURKE.

Sworn to before me, this 23d day of November, A. D. 1881.

(Signed) A. J. HOUSTON,
Clerk U. S. Cir. C't, Dallas, Texas.

Filed Jan. 23, 1882.

(Signed) A. J. HOUSTON, *Clerk.*

Note Annexed to Petition.

GAINESVILLE, TEXAS, *Nov.* 8, 1880.

No. ——. Due ——.

Seven months after date, 5189, — or either of us, promise to pay to Mulhall & Scaling, or order, ten thousand eight hundred & ninety-one $\frac{67}{100}$ dollars, at the office of Putnam, Chambers & Co., in Gainesville, Texas, for value received, with interest at the rate of one per cent. per month after maturity until paid; and in case of legal proceedings on this note, — agree to pay ten per cent. of the amount for attorneys' fees. $10,891.67.

(Signed) J. P. ADDINGTON.
(Signed) Z. T. ADDINGTON.

(Endorsed on face:) Protested June 11th, 1881, for non-payment. (Signed) P. H. Laniers, notary public, Cook county, Texas.

(Endorsed on back:) (Signed) Mulhall & Scaling. (Signed) Putnam, Chambers & Co. Filed Nov. 23, 1881. (Signed) A. J. Houston, clerk.

Protest Annexed to Petition.

UNITED STATES OF AMERICA.

GAINESVILLE, TEXAS, *Nov.* 8th, 1880.

Seven months after date, —, or either of us, promise to pay to Mulhall & Scaling, or order, ten thousand eight hundred and ninety-one $\frac{67}{100}$ dollars, at the office of Putnam, Chambers & Co., in
7 Gainesville, Texas, for value received, with interest at the rate of one per cent. per month after maturity, until paid. In case of legal proceedings on this note, — agree to pay 10% of the amount for attorneys' fees.

J. P. ADDINGTON,
Z. T. ADDINGTON.

$10,891.67.

Be it known that on the day of the date hereof, at the request of Putnam, Chambers & Co., holder of the original note, of which a true copy is above written, I, P. H. Laniers, a notary public in and for the county of Cook, in the State of Texas, by lawful authority, duly commissioned and sworn, residing in the city of Gainesville, during the usual hours of business for such purposes, presented the same to J. P. Addington & Z. T. Addington and demanded the payment thereof, which was refused.

Whereupon I, the said notary, at the request aforesaid, have protested, and do hereby solemnly protest, against all persons and every party concerned therein, whether as a maker, drawer, drawee, acceptor, payor, endorser, guarantee, surety, or otherwise howsoever, against whom it is proper to protest, for all exchange, re-exchange, cost, damages, and interest suffered, and to be suffered for want of payment thereof; of all which I fully notified the following-named parties, to wit, Mulhall & Scaling, at St. Louis, Mo., by mail; George Adams, Burke & Bro., at Chicago, Ill., by mail; Isaac G. Lomborord, cashier, at Chicago, Ill., by mail.

Thus done and protested, at the city of Gainesville, aforesaid, the 11th day of June, 1881.

[SEAL.] (Signed) P. H. LANIERS,
Notary Public.

Protest, $2.50; notices, $1.50; total, $4.00.
8 Filed Nov. 23, 1881.
(Signed) A. J. HOUSTON, *Clerk.*

(Endorsement on petition:) No. 206. Cir. c't. George Adams Burke & Bro. *vs.* J. P. Addington *et al.* Original petition. Filed Nov. 23, 1881. (Signed) A. J. Houston, clerk. (Signed) Crawford & Smith, att'ys for pl'ffs.

"Original Answer Mulhall & Scaling."

In U. S. Circuit Court at Dallas.

GEORGE ADAMS, BURKE & CO.
vs.
J. P. ADDINGTON *et al.* } No. 206.

Now come the def'ts, Mulhall & Scaling, and demur to the answer

of codef'ts, J. P. & Z. T. Addington, and say the same presents no defence to plaintiffs' cause of action. Wherefore judgment is prayed, &c.

(Signed) BARKSDALE & WILLIAMS,
Att'ys for said Def'ts, Mulhall & Scaling.

For special exceptions said def'ts say that said codef'ts' answer is vague and indefinite and presents no defence. Whereupon they pray judgments, &c.

(Signed) BARKSDALE & WILLIAMS,
Att'ys for Def'ts, Mulhall & Scaling.

For answer said def'ts deny all and singular the allegations in codef'ts' answer, and demand proof thereof, &c.

(Signed) BARKSDALE & WILLIAMS,
Att'ys for Def'ts, Mulhall & Scaling.

Said def'ts further answer and say that they are endorsers merely of the note sued on, and that their codef'ts are the principals therein. Wherefore they pray that the question of their liability
9 as such endorsers may be tried, and in the event of a finding of the fact in their favor that the court, by its judgment, order and direct the marshal to levy execution first upon the property of their codef'ts, as required by tne law in such cases, and will ever pray, &c.

(Signed) BARKSDALE & WILLIAMS,
Att'ys for Mulhall & Scaling.

(Endorsement:) No. 206. Geo. Adams, Burke & Co. *vs.* J. P. Addington *et al.* Original answer of Mulhall & Scaling. Filed Jan. 23, 1882. (Signed) A. J. Houston, clerk.

"1*st Amended Original Answer J. P. & Z. T. Addington.*"

In U. S. Circuit Court at Dallas.

GEO. ADAMS, BURKE & BROS. *vs.* J. P. ADDINGTON *et al.*

Now come J. P. Addington & Z. T. Addington, defendants in the above-entitled cause, and pray the judgment of the court of the sufficiency of plaintiffs' petition to require of defendants any other or further answer.

(Signed) C. L. POTTER &
SAWNIE ROBORTSON,
Att'ys for said D'f'd'ts.

And the said defendants, further answering, deny all & singular the allegations contained in plaintiffs' petition, & demand strict proof.

And for special answer herein the said defendants deny that they ever made & delivered the note declared upon in plaintiffs' petition; the said defendants deny that they ever delivered the said
10 note to the payees named therein, or to any other person, or that they ever authorized any one else to deliver, negotiate,

or put in circulation the said note; and they aver that the said note is neither the act or deed of either of defendants, or of them jointly. On the contrary defendants aver that possession of said note, without the fault or neglect of defendants, was illegally, fraudulently, and without the knowledge or consent of defendants, obtained by one Jos. Mulhall, one of the firm of Mulhall & Scaling, named as payees in said note, and by him the said note was fraudulently & without authority put in circulation; that there was never any consideration for the execution of said note; all of which the said defendants are ready to aver & prove.

(Signed) C. L. POTTER,
SAWNIE ROBERTSON,
Att'ys for s'd D'f'd'ts.

J. P. Addington, being duly sworn, deposes & says that the foregoing pleas of *non est factum* & want of consideration are true.

(Signed) J. P. ADDINGTON.

Subscribed & sworn to before me, this Jan'y 23, 1882.

(Signed) A. J. HOUSTON,
Clerk U. S. Cir. C't, Dallas, Texas.

And the said defendants, further answering, show that the said plaintiffs herein obtained said note without consideration colorably, after maturity, and with notice that defendants had never executed or given currency to said note, and that there was no consideration therefor.

11 And the said defendants, further answering, show that if the said plaintiffs have obtained said note in such wise as to be able to recover upon it over defendants' pleas aforesaid, then defendants aver:

1st. That said plaintiffs obtained said note in payment of or as collateral security for a debt due by the payees of said note to them, which said debt is less in amount than the principal and interest upon said note, and that they ought not to recover of defendants more than the amount of their said demand against the said payees.

2d. The said defendants show that said Mulhall & Scaling, payees in said note, & indorsers thereof, are liable upon said note in advance of defendants, and execution should first run against them; and

3d. The said defendants further show that said firm of Mulhall & Scaling are liable to them for such sum as they may be required to pay plaintiffs upon said note.

And defendants pray that in the event of any recovery herein against them by plaintiffs that execution be directed to be issued & levied first against the said firm of Mulhall & Scaling, and that the judgment to be rendered herein provide for the subrogation of defendants to the rights & judgment of plaintiffs for whatever sum defendants may be required to pay upon said note or judgment, & defendants will ever pray, &c.

(Signed) C. L. POTTER &
SAWNIE ROBERTSON,
Att'ys for s'd D'f'd'ts.

12 (Endorsements:) No. 206. Geo. Adams, Burke & Co. *vs.* J. P. Addington *et al.* 1st amended original answer. Filed Jan'y 23, 1882. (Signed) A. J. Houston, clerk.

"*Bills of Exception No.* 1."

In U. S. Circuit Court, at Dallas.

GEO. ADAMS, BURKE & BROS. *vs.* J. P. ADDINGTON *et al.* } No. 206.

Be it remembered that when the above cause was called for trial, on Jan'y 23, 1883, the plaintiffs having announced ready for trial, the defendants, J. P. & Z. T. Addington, announced not ready, and thereupon presented their sworn application for continuance, hereto attached as Exhibit "A," and upon suggestion of the court the said defendants stated, as shown by Exhibit B hereto, what they proposed to prove by the absent witness, G. W. Barefoot, and thereupon the court held that such application should be granted, unless plaintiffs & the defendants, Mulhall & Scaling, would admit the facts proposed to be proved by said witness, as contained in the 1st, 3d, & 4th paragraphs thereof; the plaintiffs thereupon discontinued their said suit as to the defendants, Mulhall & Scaling, to which defendants Addingtons objected, on the ground that plaintiffs' said action could not dispose of the formed issues between said two sets of defendants, & that such action would prejudice defendants in their rights in said cause if plaintiffs' action was given the effect aforesaid. Their objections were overruled, the court directing that such discontinuance should be without prejudice to defend-

13 ants' rights *intersese* in any other suit; to which ruling defendants excepted, and thereupon defendants' application for continuance was overruled upon plaintiffs agreeing that the 4th paragraph of said Exhibit B should be admitted as true, if plaintiff introduced Jos. Mulhall as a witness; to this ruling defendant excepted; and this bill of said several exceptions is allowed & ordered to be made part of the record herein.

(Signed) DON A. PARDEE, *Judge.*

(Endorsement:) No. 206. Geo. Adams, Burke *et al. vs.* J. P. Addington *et al.* Bill of exceptions No. 1. Filed Jan'y 24, 1883. (Signed) A. J. Houston, clerk.

EXHIBIT "A."

In U. S. C. C., at Dallas.

GEO. ADAMS, BURKE & BRO. *vs.* J. P. ADDINGTON *et al.*

Now comes defendants, J. P. & Z. T. Addington, & move the court for a continuance of the above cause for want of the testimony of G. W. Barefoot, a material witness for said defendants in said cause, who resides within one hundred miles of the city of Dallas, to wit, at Montgomery, Texas, and for whom defendants have had sub-

pœnas duly issued on, to wit, Nov. 16, 1882, and the same was served on said witness on, to wit, Nov. 18, 1882, and the fees of said witness & his mileage were duly tendered him; said witness was in attendance upon the court at this term from the 14 of Jan'y, 1883, until the 18 day of said month, and then departed without the procurement or consent of defendants; that on the 19 day of Jan'y, 1883, defendants applied for attachment for said witness, and the
14 said witness is not present, but is absent without the procurement or consent of defendants; said witness' testimony is material to defendants in said cause and cannot be had from any other source now attainable by defendants, nor attainable since said Barefoot left the court at this term. Defendants expect to have said testimony at the next term of the court, & this application is not made for delay, but that justice may be done. Wherefore, &c.

(Signed) J. P. ADDINGTON.

Sworn to before me, this 23rd day of January, 1883.

(Signed) A. J. HOUSTON, *Clerk.*

(Endorsements:) 206. Defendant's application for continuance. Filed Jan'y 23d, 1883. (Signed) A. J. Houston, clerk.

EXHIBIT "B."

Facts which defendants Addingtons expect to be able to prove by the absent witness, G. W. Barefoot:

1st. That in the month of September, 1880, the defendant, Jos. Mulhall, proposed to give him, witness, a rebate of ten doll's per car on shipments of cattle from Gainesville, Texas, to Chicago.

2d. That during the year 1880 defendant Mulhall held out to the public that defendants Addingtons were but the agents of Mulhall & Scaling, & not their partners, in the business carried on by defendants at Gainesville, Texas, and that this was the general understanding in Gainesville & Cook & Montague counties.

15 3d. That Jos. Mulhall, in conversation with said witness, never claimed that defendants Addingtons were indebted to Mulhall & Scaling in above the sum of seventeen thousand dollars.

4th. That after the date at which it is now claimed that defendants, Mulhall & Scaling, endorsed & delivered the note sued on to plaintiffs the said Jos. Mulhall claimed to be the owner & holder of said note, and that this was after the maturity of the note sued upon.

5th. That defendant Mulhall resided, during the year 1880, at Gainesville, Texas; that witness also spent there & has since a large part of his time in Gainesville, Texas, and that Jos. Mulhall's reputation for truth & veracity in said neighborhood is bad.

J. P. Addington, being sworn, states that he expects to prove the foregoing facts by the witness, G. W. Barefoot.

(Signed) J. P. ADDINGTON.

Subscribed and sworn to before me, this 23rd day of January, 1883.

(Signed) A. J. HOUSTON, *Clerk.*

(Endorsement:) 206. Filed Jan'y 23, 1883. (Signed) A. J. Houston, clerk.

"Bill of Exceptions No. 2."

In U. S. Circuit Court at Dallas.

GEO. ADAMS, BURKE & BRO.
vs.
J. P. ADDINGTON *et al.* } No. 206.

Be it remembered that on the trial of the above cause the defendants offered to prove by the witnesses, Looney and G. W. Barefoot (the statement of what the latter would prove in paragraph 4 of Exhibit "B" to bill of exceptions No. 1, being considered as
16 the testimony of the witness if admissible) that after the maturity of the note sued upon for Mulhall one of the payees of said note claimed to be the owner & holder of said note, and by said Looney that said Mulhall claimed to have said note in his possession, and to this proof plaintiff objected, and the court sustained the objections, & excluded the testimony on the ground that defendants' & plaintiff's testimony, as contained in bill of exception No.—, having failed to show that plaintiffs were other than holders for value by purchase before maturity of the note sued on, the said testimony was irrelevant. And to this ruling defendants excepted, and this bill of said exception is allowed & ordered filed as a part of the record.

By the COURT: The proof in the case by the plaintiffs, and by the defendants' own testimony, showed that the plaintiffs acquired the note sued on before maturity. As the testimony offered was as to whether plaintiffs had acquired the note at all, and was as to the declarations of one not a party nor witness, and as the witnesses were absent and could not be cross-examined, the evidence offered was held irrelevant and immaterial.

(Signed) DON A. PARDEE, *Judge.*

(Endorsements:) No. 206. Geo. Adams, Burke & Bro. *vs.* J. P. Addington *et al.* Bill of exception No. 2. Filed Jan'y 24, 1883. (Signed) A. J. Houston, clerk.

"Bills of Exception No. 3."

In U. S. Circuit Court at Dallas.

GEO. ADAMS, BURKE & BRO.
vs.
J. P. ADDINGTON *et al.* } No. 206.

17 Be it remembered that on the trial of the above cause the defendants requested the court to charge the jury as follows:

1st. That if the jury believe from the evidence that the note sued

upon was without consideration or obtained from defendants by the payees by fraud, and was subsequently indorsed & delivered by said payees to the plaintiffs before maturity for value, then both the payees & makers would be bound to plaintiffs upon said note, but the payees would be the principal obligors, and the plaintiffs, having dismissed as to them after bringing them into court, cannot recover in this suit against the defendants, who, upon the hypothesis stated in this charge, would be only secondarily liable.

2d. The note offered in evidence, & which is the basis of this suit, is not negotiable by law, and if there was no consideration for the note sued on, or if obtained from defendants' possession without any purpose on their part to deliver it as a note or put it in circulation, then the plaintiffs cannot recover, & you should find for defendants.

3d. The contract to pay attorneys' fees embraced in the note sued upon is not by law negotiable, and if the said note was procured by the payees without consideration or fraudulently the plaintiffs can only recover the principal & interest due upon said note & protest fees, & no more.

4th. The purchaser of negotiable paper takes the risk of its not having been made by the maker, & delivery is a part of such
18 making as is necessary to a valid note. If one of the makers put this note into the hands of one of the payees, but without any purpose to deliver it as a note, whether the makers are liable or not depends upon whether they were guilty of any negligence in allowing the paper to escape into circulation. Negligence is doing something which, under the same circumstances, a prudent person would not have done, or omitting to do something which should have been done. In the light of this definition you are to determine whether the defendants in their transaction with Mulhall were guilty of negligence. If they were the plaintiffs should recover; otherwise not.

6th. If under the charges given the plaintiffs are to recover in this suit as innocent purchasers, the burden of proof that they are such is upon them.

All of which instructions the court refused, & to this action of the court defendants excepted. And the testimony is the case being as follows: "It was proved upon the trial that the note in plaintiffs' petition was signed by defendants, and that it was obtained from them by Jos. Mulhall, one of the payees, by fraud & without consideration, and was then before maturity negotiated & delivered to plaintiffs before maturity in payment of a debt due by Mulhall & Scaling to plaintiffs—plaintiffs at the date of receiving the said note having no notice of the fraud & want of consideration aforesaid."

The court instructed the jury substantially as follows
19 (after stating the nature of the suit and the defences): "That the making of a note such as to entitle an innocent holder to recover was accomplished by its being signed by the maker & delivered to the payee regardless of the purpose of the delivery; that plaintiffs were innocent holders of the note if they obtained it for value before maturity without notice of the defences claimed against, and that if plaintiffs acquired the note for value and before maturity the burden of proof as to such notice is upon the defendants." To

this charge of the court the defendants excepted on the ground that the 4th special instruction asked should have been given on the issue as to defendants' liability at all, and that the 6th special instruction should have been given as to the burden of proof.

And this bill of said exceptions is allowed & ordered filed as part of the record in said cause.

(Signed) DON A. PARDEE, *Judge.*

(Endorsement:) No. 206. Geo. Adams, Burke & Bro. *vs.* J. P. Addington *et al.* Bill of exception No. 3. Filed Jan'y 24, 1883. (Signed) A. J. Houston, clerk.

"*Judgment.*"

JANUARY 24, 1883.

GEORGE ADAMS, BURKE and BROTHER *vs.* J. P. and Z. T. ADDINGTON and MULHALL and SCALING. } No. 206.

This day, this case being called, came the parties in person and by their attorneys, and the plaintiffs, Geo. Adams, Burke and Brother, announced themselves ready for trial, and the defendants, Mulhall and Scaling, also announce themselves ready for trial, and
20 the defendants, J. P. and Z. T. Addington, announce themselves not ready for trial, and thereupon submitted their application for continuance to the court, pending the consideration of which the plaintiffs asked leave of the court to discontinue their suit as to Mulhall and Scaling, upon which the court allowed the plaintiffs, George Adams, Burke and Brother, to discontinue their suit as to Mulhall and Scaling, but without prejudice to any of the rights or equities existing between the defendants, Mulhall and Scaling, and their codefendants, J. P. and Z. T. Addington. And the court then overruled the application of defendants J. P. and Z. Addington for continuance; and thereupon came a jury of good and lawful men, to wit, W. C. Petty, R. J. Patton, J. W. Baird, J. I. Williams, J. D. Carroll, E. J. Ricks, G. W. Cunningham, C. R. Miller, Eli Bradley, A. G. Leffle, W. O. Dibold, and A. H. Reat, who, being duly empanneled, sworn, and charged, as the law directs, and after having heard the pleadings of the parties, the testimony of the witnesses and the argument, and having received the charge of the court, retired to consider of their verdict, and afterwards returned into open court the following verdict, to wit: "We, the jury, find a verdict in favor of plaintiffs—one note, ten thousand eight hundred and ninety-one and $\frac{67}{100}$, $10,891.67, interest on same for one year seven and one-half months, at 12 per cent., $2,123.87; ten per cent. attorney's fee on face of note, $1,089.16; total, $14,104.70.

"(Signed) J. W. BAIRD, *Foreman.*"

It is therefore considered and adjudged by the court that
21 the plaintiffs, George Adams, John C. Burke, and James C. Burke, in their firm name of George Adams, Burke and Brother, do have and recover of the defendants, J. P. Addington

and Z. T. Addington, the said sum of fourteen thousand one hundred and four dollars and seventy cents, together with interest thereon at the rate of twelve per centum per annum from the date of the rendition of this judgment, and all costs of suit, for which let execution issue. It is further ordered by the court that execution issue against the parties, respectively, in favor of officers of court, for all costs incurred by them.

"Writ of Error Bond."

Supreme Court of United States.

J. P. ADDINGTON & Z. I. ADDINGTON *vs.* GEO. ADAMS, BURKE & BRO.

Know all men by these presents, that we, J. P. Addington & Z. Addington, as principal, & —— and ——, as sureties, are held & firmly bound unto George Adams, Burke & Bro., a partnership composed of Geo. Adams, James C. Burke, and Jno. C. Burke, in the sum of twenty-five thousand dollars ($25,000), to be paid to the said George Adams, Burke & Bro., their executors, or administrators; to which payment, well & truly to be made, we bind ourselves & each of us, jointly & severally, and one & each of our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals & dated this January 25, 1883.

Whereas the above-named J. P. Addington [and] Z. T. Ad-
22 dington have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of George Adams, Burke & Bro. *vs.* J. P. Addington & Z. T. Addington, in the circuit court of the United States for the northern district of Texas, at Dallas, on January 24th, 1883, for the sum of fourteen thousand one hundred & four $\frac{70}{100}$ dollars and all costs of suit: Now, condition of this obligation is such that if the above-named J. P. Addington & Z. T. Addington shall prosecute their said writ of error to effect and answer all damages & costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be & remain in full force & virtue.

(Signed)	J. P. ADDINGTON.	[SEAL.]
(Signed)	Z. T. ADDINGTON.	[SEAL.]
(Signed)	A. J. ADDINGTON.	[SEAL.]
(Signed)	JNO. H. STONE.	[SEAL.]
(Signed)	R. S. ROLLINS.	[SEAL.]
(Signed)	E. T. MORRIS.	[SEAL.]
(Signed)	L. G. CAIRNS.	[SEAL.]

THE STATE OF TEXAS, *County of Cooke:*

I, J. F. Lilly, clerk of the district court within and for the county of Cooke, in the State of Texas, do hereby certify that A. J. Addington, John H. Stone, R. S. Rollins, E. T. Morris, and L. G. Cairns, the sureties on the above and foregoing bond, and whose genuine signatures appear thereto, are solvent and worth the amount of
23 said bond, and that I would unhesitatingly accept and approve

a bond with said parties as sureties and for said amount of twenty-five thousand dollars if offered to me for approval.

Given under my hand and seal of office, at office in Gainesville, Texas, on this 25th day of January, A. D. 1883.

(Signed) J. F. LILLY. [SEAL.]

Clerk of the District Court, Cooke County, Texas.

(Endorsement:) Bond for super-deas in the within cause having been fixed by the court at the sum of twenty-five thousand dollars, I hereby approve & order the within bond for said sum to be filed this January 30, 1883. (Signed) A. P. McCormick, U. S. dist. judge. No. 206. J. P. & Z. T. Addington, plaintiff- in error, *vs.* George Adams, Burke & Bro., defendants in error. Bond on writ of error. Filed Jan'y 30th, 1883. (Signed) A. J. Houston, clerk.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the records and proceedings, and also in the rendition of a judgment of a plea, which is in the said circuit court before you, between George Adams, Burke and Brother and J. P. and Z. T. Addington, a manifest error hath happened to the great damage of the said J. P. and Z. T. Addington, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be thereon given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday in October next in the said Supreme Court to be then and there held,

25 that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of January, A. D. 1883.

[Seal of the U. S. Circuit Court Northern Dist. Texas, Dallas.]

A. J. HOUSTON,

Clerk of Circuit Court for the Northern District of Texas, at Dallas.

[Endorsed:] No. 206. In U. S. circuit court, Dallas, Texas. J. P. and Z. T. Addington, plaintiffs in error, *vs.* Geo. Adams, Burke & Bro., defendants in error. I hereby certify that this writ of error herein was lodged with me this day by plaintiffs in error for service upon defendants in error this 30th day of January, 1883. A. J. Houston, clerk U. S. circuit court for the northern district of Texas, at Dallas.

26 UNITED STATES OF AMERICA, *ss:*

To George Adams, Burke & Bro., Greeting:

You are hereby cited & admonished to be & appear at a Supreme

Court of the United States to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein J. P. & Z. T. Addington are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this January 30, A. D. 1883.

A. P. McCORMICK,
U. S. Dist. Judge.

UNITED STATES OF AMERICA, *ss:*

Phil. B. Miller, being sworn, states that he has this day delivered to L. F. Smith, one of the attorneys of record for George Adams, Burke & Bro. in their suit against J. P. & Z. T. Addington, said L. F. Smith being one of the law firm of Crawfords & Smith, a true copy of the foregoing citation in error.

PHIL. B. MILLER.

Subscribed & sworn to before me, this Jan'y 30, 1883.

A. J. HOUSTON,
Clk U. S. Circuit Court Northern District of Texas, at Dallas.

27 [Endorsed:] No. 206. J. P. & Z. T. Addington, pl'ffs in error, *vs.* Geo. Adams, Burke & Bro., d'f'dts in error. Citation in error. Filed Jan'y 30, 1883. A. J. Houston, clerk.

28 *Clerk's Certificate.*

United States of America, Northern District of Texas, at Dallas.

I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing twenty-two & ½ pages contain a full, true, and correct transcript of the "original petition," Mulhall & Scaling's original answer, J. P. & Z. T. Addington (d'f'ts') 1st amended, original answer, bill of exceptions numbers 1, 2, 3, the judgment of the court, the bond for writ of error and the originals of the error and citation in error in cause No. 206, law, on the docket of said court, and styled George Adams, Burke & Bro. *vs.* J. P. Addington *et al.*, all of which appears from the records of said court.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof, this 4th day of August, A. D. 1883.

[Seal of the U. S. Circuit Court Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of the United States Circuit Court for the Northern District of Texas, at Dallas.

Endorsed on cover: N. Texas, C. C. U. S. No. 272. J. P. and Z. T. Addington, plaintiffs in error, *vs.* George Adams, Burke and Brother. Filed 5th September, 1883.

FILED
DEC 13 1885
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT

of the United States,

October Term, 1885.

J. P. and Z. T. ADDINGTON, Plaintiffs in Error,

vs.

GEO. ADAMS, BURKE & BRO.

No. 272.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS SESSION.

BRIEF OF PLAINTIFFS IN ERROR.

J. P. and Z. T. ADDINGTON.

By their Attorneys,

C. L. POTTER and SAMUEL ROBERTSON.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

J. P. and Z. T. ADDINGTON, Plaintiffs in Error,

vs.

GEO. ADAMS, BURKE & BRO.

No. 272.

BRIEF OF PLAINTIFFS IN ERROR.

Statement of the Case.

On the 23rd day of November, 1881, the Defendants in error, brought suit in the Circuit Court for the Northern District of Texas, at Dallas, against Plaintiffs in Error, J. P. and Z. T. Addington, residents of Cooke county, Texas, as the makers of a promissory note for the sum of Ten Thousand

Eight Hundred and Ninety-one and 67 100 Dollars, with interest and attorney's fees, and against Mulhall & Scaling, residents of St. Louis, Missouri, as indorsers of said note. Defendants in Error alleging purchase of note from Mulhall & Scaling for value before maturity and indorsment by them. Plaintiffs in Error answered under oath, by plea of *non est factum* and failure of consideration; also that the Defendants in Error obtained said note without consideration, colorably after maturity and with notice of defenses, etc., and also, if Defendants in Error were such innocent purchasers of said note, as to make Plaintiffs in Error liable to them on the same, by reason of the manner in which they obtained the note, etc., yet they would only be liable secondarily or after Mulhall & Scaling, and that said Mulhall & Scaling were liable to Plaintiffs in Error, in whatever sum they should be compelled to pay, by reason of said note to the Defendants in Error, as such innocent holders, and prayed to be protected by the judgment of the court, and to be subrogated to the rights of the Defendants in Error under said judgment for whatever sum (they) so paid out on the same. Mulhall & Scaling filed a separate answer in which they excepted both generally and specially, to the answer of Plaintiffs in Error, and then joined issue with them, denying their allegations and specially pleading their suretyship by reason of the indorsement of said note, etc. (Rec. Pages 1, 2, 5 and 6.)

With the pleadings in this condition, the case was called for trial in the Circuit Court, January 23d, 1883. The De-

fendents in Error, announced ready for trial, Plaintiffs in Error not ready, and filed their application for a continuance which was held valid by the court unless the *truth* of the facts therein stated, be admitted by the Defendants in Error and Mulhall & Scaling. This they declined to do, and the Defendants in Error, over objection of Plaintiffs in Error, discontinued the suit as to Mulhall & Scaling.

The cause was then tried as to Plaintiffs and Defendants in Error, and resulted in a verdict and judgment in favor of Defendants in Error, for the full amount of said note, interest and attorneys' fees, from which this writ of error is prosecuted, bills of exceptions being reserved to the rulings of the court upon the material points.

First Error Urged.

It was error in the court to permit the dismissal of the cause as to Mulhall & Scaling, after all parties had submitted to the jurisdiction of the court, and joined issue upon the merits of the controversy, as to the execution of the note, its want of consideration, and the manner in which it was acquired by Defendants in Error.

BRIEF OF ARGUMENT.

The suit was a joint one, against all of the Defendants (Rec. p p 1 and 2.) Residence of Plaintiffs in Error was alleged to be in Cooke county, Texas, and of Mulhall & Scaling at St. Louis, Mo. Plaintiffs in Error answered, putting in

issue the execution of the note, the want of consideration, and also alleging Mulhall & Scaling's liability to them in case they were held liable to Defendant's in Error, and, asking judgment first against them and for subrogation, etc. (Rec. p p 5 and 6.) Mulhall & Scaling voluntarily came in and joined issue with Plaintiffs in Error in *behalf* of Defendants in Error. (Rec. pp 5.)

Plaintiffs in Error sought a continuance for evidence to prove their defenses. Defendants in Error relying solely upon their claim of innocent purchasers, were permitted to dismiss as to Mulhall & Scaling over objections of Plaintiffs in Error, and proceed to trial as to the other Defendants. (See Rec. pp 7 and 8, Bill of Exceptions No.1.) Upon the trial it was *proven* that the note sued on was obtained from Plaintiffs in Error by *fraud and without consideration*. (Rec. pp 10, latter part of Subdivision 18, Bill of Exception No. 3.) Thus, at the instance of Defendants in Error, the party committing the fraud was permitted to go hence and reap the fruit of his iniquity, while the Plaintiffs in Error paid the consequences without being permitted to recover over against the party defrauding them and without being subrogated to the rights of Defendants in Error after the payment of the judgment. Upon the right to dismiss as to one or more defendants, the Revised Statutes of Texas provides as follows:

Art. 1259. "The Court may permit the plaintiffs to discontinue his suit as to one or more of several defendants who may have been served with process, or who may have answered, when such

discontinuance would not operate to the *prejudice* of the other defendants; but no such discontinuance shall in any case, be allowed as to a principal obligor except in the cases provided for in Article 1257."

Article 1257 reads: "Where a suit is discontinued as to principal obligor, no judgment can be rendered therein against an indorser, guarantor, surety or drawer of an accepted bill, who is jointly sued, unless it is alleged and proven that such principal obligor resides beyond the limits of the State or in such part of the same that he cannot be reached by the ordinary process of law, or that his residence is unknown and cannot be ascertained by the use of reasonable diligence, or that he is dead or not, or actually or notoriously insolvent."

Article 1256 reads: "Where there are several defendants in a suit, and some of them are served with process in due time, and others not so served, the plaintiffs may either discontinue as to those not so served, and proceed against those that are, or he may continue the suit until the next term of the Court, and take new process against those not served; and no defendant against whom any suit may be so discontinued shall be thereby exonorated from any liability under which he was, but may at any time be proceeded against as if no such suit had been brought and no such discontinuance entered."

Article 1259 is an addition to the Old Statutes and was added in 1879. The decisions in Texas upon this question were

under an Article almost literally the same as Article 1256. What is meant by the term "without prejudice" as used in Article 1259? If Mulhall & Scaling resided in St. Louis, the courts of Texas lost jurisdiction of their persons as soon as the suit was dismissed as to them and the direction of the Court below that it should be without prejudice, could not effect the amount of extra costs, expenses and trouble of bringing a new suit by Plaintiffs in Error against them in St. Louis, Mo., besides the fearful consequences of delay and being forced to pay a judgment of the size of this before judgment could be obtained against the wrong-doer. A dismissal could not be said to be without prejudice, that worked the hardships of this one. See:—

Horton vs. Wheeler, 17 Texas 58.
Henderson vs. Kissam, 8 Texas 46.
Sullivant vs. Thorn, 5 Arkansas, 144, and authorities there cited.
White vs. Leavitt, 29 Texas, 704.
Opinion on rehearing in Barnett vs. Tayler, 29 Texas 455.

Second Error Urged:

The issue being as to who was the true principal in the cause, it was error for the court to permit a discontinuance as to Mulhall & Scaling without a compliance with Article 1257, Revised Statutes of Texas. Supra. And the Plaintiffs in Error having sought affirmative relief as to such defendants, the court could not deprive them of the same by a mere dismissal as to them at the request of Defendants in Error.

BRIEF OF ARGUMENT.

No proof was made as to the residence of Mulhall & Scaling and no pleading or proof as to insolvency or other provisos of the Statutes. (Rec. pp 10.) If Mulhall & Scaling had sold and indorsed a forged or invalid note to Defendants in Error, the indorsers would be primarily liable thereon and if Plaintiffs in Error were liable on the same by reason of the innocence of Defendants in Error, it was only a secondary liability, or in the character of surety:

1st Daniel on Neg. Instruments, Edition of 1876, page 497, Sec's 669, 672, 673 and 674.
Chitty on Bills, 13 Am. Ed. 82, 90 and 95.
Parsons on Notes and Bills, 218
Edwards on Bills, 239 and 250.
Story on Notes, Sec. 142
Maffett vs. Bickle, 21 Grat. 283 and authorities there cited.

And, in Texas, the entire issue could be tried in one cause and all parties protected by the same judgment. Subrogation of the surety, in Texas, is provided for as follows: "Art. 3664 (R. S. of Texas): When any person being surety in any undertaking whatever, shall be compelled to pay any judgment or any part thereof, or shall make any payment which is applied on such judgment by reason of such suretyship, the said judgment shall not be discharged by such payment, but shall remain in force for the use of such surety, and shall be considered as assigned to such surety together with all the rights of the creditor thereunder to the extent of the payment thereon made by such surety and interest thereon; and such surety shall be entitled to have execution thereon in

the name of the creditor for the use of such surety against the principal debtor for the full amount of such payment and interest thereon and all costs, which execution shall be issued upon the application of such surety to the clerk, or court, as the case may be, and shall be levied, collected and returned as in other cases.

Third Error Urged :

The note sued on was not negotiable, being burdened with a contract to pay attorney's fees, and the same being invalid between the original parties, could not be enforced in this suit.

BRIEF OF ARGUMENT.

It was provided in said note as follows : "In case of legal proceedings on this note, ——— agree to pay ten per cent. of the amount for attorney's fees." (Rec. pp 4.) The Plaintiffs in Error requested the Court to charge the jury as follows: "The note offered in evidence and which is the basis of this suit, is not negotiable by law, and if there was no consideration for the note sued on, or if obtained from defendants' possession without any purpose on their part to deliver it as a note or put it in circulation, then the plaintiffs cannot recover, and you should find for defendants." "The contract to pay attorney's fees, embraced in the note sued upon, is not by law negotiable, and if the said note was procured by the payees without consideration or fraudulently, the plaintiffs can only recover the principal and interest due upon said note

and protest fees and no more;" but the charges were declined. (Rec. pp 10, Sec. 2, Bill of Exception No. 3—and the contrary given.) This was an error that goes to the foundation of the action; and, further, the note, on its face, here shows to be incomplete and the blanks in the same would put any prudent man on inquiry as to its validity :—

Woods vs. North, 84 Penn. St. 407.
Johnson vs. Speer, 92 Penn. St. 227.
First National Bank of New Windsor vs. Bynum, 84 N. C. 24.
First National Bank of Trenton vs. Gray, 63 Mo. 33.
Morgan vs. Edwards, 58 Wis. 589.
Mahony vs. Fitzpatrick, 123 Mass. 151; and
Maryland Fertilizing & Manufacturing Co. vs. Newman, 60 Md. 584.

In this last case the authorities are ably reviewed and discussed. Other cases hold the contract void and consequently not affecting the note.

Fourth Error Urged :

If the note was negotiable, the contract to pay attorney's fees was not, and being void by reason of fraud and want of consideration, could not be recovered upon. Plaintiffs in error asked a charge presenting this question. Rec. pp 10, Argument under Third Error Urged.) Supra. See—

Overton vs Taylor, 3 Barr 346.

Fifth Error Urged :

The pleading and the proof showing the invalidity of the note as between the original parties, for fraud and want of consideration. It was error to refuse to charge the jury that the burden of proving that they were innocent purchasers was on the Defendants in Error, as requested by the Plaintiffs in Error. (Rec. pp 10.)

BRIEF.

The Plaintiffs in Error requested this charge: "If under the charges given, the plaintiffs are to recover in this suit as innocent purchasers, the burden of proof that they are such is upon them."

Whitehead vs. McAdams, 18 Texas 551.
Smith vs. Sac county, 11 Wall. 139.
McClintic vs. Cummins, 2d McLean 96, 6th Grat. 248.
Ryles on Bills 228, 1st Daniel on Neg. Instruments, p 610 and 611 Sec. 813 and cases cited.

Sixth Error Urged;

The Court erred in not submitting to the jury the question of the negligence of the Plaintiffs in Error in permitting the note in controversy to get into circulation.

BRIEF.

The Plaintiffs in Error plead *non est factum.* (Rec. pp 4 and 5.) The proof showed that the note had been fraudulently put in circulation by one that Plaintiffs in Error had reason to trust, and their negligence in this regard was a question in the case. Plaintiffs in Error asked this charge: "The purchaser of negotiable paper takes the risk of its not having been made by the maker, and delivery is a part of such making, and is necessary to a valid note. If one of the makers put this note into the hands of one of the payees, but without any purpose to deliver it as a note, whether the makers are liable or not depends upon whether they were guilty of any negligence in allowing the paper to escape into circulation. Negligence is doing something, which, under the same circumstances, a prudent person would not have

done, or omitting to do something which should have been done. In the light of this definition, you are to determine whether the defendants in this transaction with Mulhall were guilty of negligence. If they were, the plaintiffs should recover; otherwise, not." (Rec. pp 10, Bill of Exception No. 3.)

Burson vs. Huntington, 21 Mich. 415.
Cline vs. Guthrie, 62 Ind. 227.
Chipman vs Tucker, 38 Wis. 43.
Walker vs. Egbert, 29 Wis. 194.

Many other authorities are refered to in these cases not necessary to repeat here.

Seventh Error Urged :

It was error for the Court not to permit Plaintiffs in Error to prove by the witnesses, Barefoot and Looney, that Mulhall, of Mulhall & Scaling, had the note sued on in his possession, and cl imed to own it after its maturity, and after this suit was brought. (Rec. 9.)

BRIEF.

Defendants in Error claimed to be innocent purchasers of the note. Plaintiffs in Error offered to prove that Mulhall had possession of the same, claiming it after maturity. (Bill of Exception 2, Rec. 9.) The declaration of one in possesiion as to the character of such possession, are admisable in evidence.

For the errors here noticed it is respectfully submitted that the cause should be reversed and remanded for a new trial.

C. L. POTTER, and
SAWNIE ROBERTSON,
Attorneys for Plaintiffs in Error.

IN THE

CONTENTS TERM, 1898.

J. F. and Z. T. ADDINGTON,

—vs.—

GEO. ADAMS, BURKE & [illegible],

No. 272.

In Error to the Circuit Court of the United States for the Northern District of Texas, at Dallas.

BRIEF OF DEFENDANTS IN ERROR.

GEO. ADAMS, BURKE & [illegible],

Defendants' Attorneys, M. L. Crim, Jr.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1885.

J. P. AND Z. T. ADDINGTON,
Plaintiffs in Error.

—*vs.*—

GEO. ADAMS, BURKE & BRO.,
Defendants in Error.

No. 272.

BRIEF OF DEFENDANTS IN ERROR.

The first and second errors assigned, both having reference to the ruling of the Court below in permitting a discontinuance of the suit as to Mulhall and Scaling. The payees and indorsers of the note sued on will be considered together.

Mulhall and Scaling were sued as indorsers. They were non-residents, and voluntarily entered their appearance to the suit. The Addingtons, in their answer, insisted that by reason of the fraud in the inception of the note, they were only secondarily liable;

and that Mulhall and Scaling were liable over to them for any amount which they might be compelled to pay. It was upon the issue thus raised between the Addingtons and Mulhall and Scaling that the application for a continuance was based. The Addingtons could not delay the suit of the plaintiffs below until the question of suretyship between themselves and Mulhall and Scaling could be tried.

Article 3662 Revised Statutes of Texas is as follows: "When any suit is brought against two or more defendants upon any contract, any one or more of the defendants being surety for the others, the surety may, upon a written statement of the matter being set out in his answer, cause the question of suretyship to be tried and determined upon the issue made for the parties, defendant at the trial of the cause, or at any time before or after the trial, or at a subsequent term, but such proceedings shall not delay the suit of the plaintiff."

Dawson vs. Hardy, 33 Tex.

Mulhall and Scaling, being indorsers, need not have been sued in the first instance, and the practice in Texas is well established that where a defendant need not have been joined, or where it may be desirable to dismiss as to one of several defendants, and the liability of the defendants is such that an action can be maintained against the others without joining

him, the plaintiff may enter a nolle prosequi as to him and have judgment against the other defendants.

Shipman vs. Allee, 29 Tex., 20.

Cook vs. Phillips, 18 Tex., 31.

Adams vs. Addington, 4 Woods, C. Ct. Rept. 393.

The case last cited is the case now before the Court, and was then before the Circuit Court upon an application for a new trial.

To the third and fourth errors assigned, defendants in error submit, in reply, that in Texas promissory notes containing a stipulation for the payment of attorneys fees are valid and the note negotiable.

Miner vs. Paris Exchange Bank, 53 Tex., 559.

Roberts vs. Palmore, 41 Tex., 617.

Washington vs. National Bank of Denton, 1885, not reported.

Adams vs. Addington, 4 Woods, 390.

This is the rule in most of the United States Circuit Courts where the question has been raised.

Howenstein vs. Barnes, 4 Dill, 484.

Bank of British North America vs. Ellis, 6 Sawy, 105.

Wilson S. M. Co. vs. Moreno, 6 Sawy, 35.

Adams vs. Addington, 4 Woods, 390.

In the Merchants' National Bank vs. Sevier, U. S. C. C. for the Eastern District of Arkansas, 14th Fed-

eral Reporter, 667, the Court held such a stipulation void. Circuit Judge McCrary, however, stated that in construing contracts made or to be performed in a State where a different rule had become established law, he might be inclined to abide the local adjudications.

In Howenstein vs. Barnes *su pra* the note sued on was executed in Kansas, but was payable in Missouri. Suit was instituted in Kansas. By the law of Missouri the note was not negotiable. In Kansas it was.

The United States Circuit Court, in deference to the opinions of the Local Courts, held that the stipulation was valid and the note negotiable.

I respectfully invite the attention of the Court to this case in 4 Woods, 390, and to the note to the Merchants' National Bank vs. Sevier, 14 Federal Reporter, 667, where a number of cases upon this question are collated. The State Courts are in irreconcilable conflict. The weight of authority is in favor of the validity of such stipulations. They are valid in Texas, and I respectfully submit that the recovery should not be less simply because the party sues in the Federal rather than in the State Court.

If the Court should be of opinion that the stipulation for attorney's fees is invalid and can not be enforced, in that event defendants here offer to remit the amount so awarded, to-wit, $1,089.16, and ask that the judgment be affirmed for the principal, $10,891.67,

and interest, $2,123.87; total, $13,015.54. (See judgment Rec. fo. 11.

The fifth and sixth errors assigned are immaterial. There was no conflict in the testimony; that adduced by both parties showed that defendants in error acquired the note before maturity and for value without notice of any fraud in its inception. (Note to Bill of Exceptions No. 2, Rec., fo. 9; Bill of Exceptions No. 3, 6 Sub Div. Rec., fo. 10.)

The seventh error is not supported by the record. It was not proposed to prove by the witness, Looney, as a fact that Mulhall had the note in his possession, but only that he claimed to have it. I respectfully ask that the judgment be affirmed.

M. L. CRAWFORD,
Attorney for Defendants in Error.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 1121.

CITY OF SHREVESPORT, LOUISIANA, PLAINTIFF IN ERROR,

vs.

JOHN B. HOLMES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 7, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1121.

THE CITY OF SHREVESPORT, LOUISIANA, PLAINTIFF IN ERROR,

vs.

JOHN R. HOLMES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 10, 1887.

1 *Petition.*

To the honorable the judges of the first judicial district of the State of Louisiana, holding sessions in and for the parish of Caddo:

The petition of John R. Holmes, a resident of Galveston, Texas, & a citizen of the State of Texas, with respect represents that the city of Shreveport, a municipal corporation created by the State of Louisiana, situated in the parish of Caddo, in said State, and a citizen of said State of Louisiana, is justly indebted to him in the sum of one thousand dollars, with eight per cent. per annum interest thereon from the 1st day of October, A. D. 1869, until paid, for this, viz:

On the 3rd day of June, A. D. 1869, the said city, in order to raise means for making improvements on its streets, wharves, etc., through its council enacted an ordinance providing for the issuance of two hundred bonds of said city, each for the sum of one thousand dollars, bearing interest at the rate of eight per cent. per annum, payable to bearer ten years after date, and also providing for levying and collecting annually a tax sufficient to pay the interest on said bonds, and also for a sinking fund out of which to pay said bonds as they matured, all of which will be seen by reference to an authentic copy of said ordinance, hereto annexed as a part hereof, marked "A."

Petitioner avers that thereupon said bonds were engraved, prepared, and signed by officers of said city in accordance with the requirements of said ordinance.

2 Petitioner avers further that subsequently and by various ordinances of its council said city provided for the improvement of its streets, avenues, wharves, etc., and particularly for the improvement of Commerce, Milam, Crockett, and Texas streets, Texas avenue, and of the wharf of said city, and entered into contracts with divers persons, among others, M. Baer, William Robson, D. J. Elder, the Shreveport City Railroad Company, and with various other citizens and property-holders of said city, to have said improvements made at a stipulated price, all of which is shown by authentic copies of said ordinances and contracts, hereto annexed as part hereof.

Petitioner avers the improvements and work so contracted for were made and was done by said contractors, were accepted by said city, enured greatly to its benefit, and were well worth the amount which the city had bound itself to pay therefor.

Petitioner avers further that the said city, in evidence of its indebtedness for said work and improvements so as aforesaid done and made, issued and gave to the said M. Baer, Wm. Robson, D. J. Elder, the Shreveport City Railroad Company, and other citizens a number of said bonds so as aforesaid authorized by said ordinance of June 3, 1869, and among others, bond No. 54, of which a copy — hereto annexed and made part hereof.

3 Petitioner avers that said bond originally issued to the Shreveport City R. R. Co. was by said company transferred and assigned for a valuable consideration before maturity and in due course of commercial transactions; that for several years said

city paid to any holder of said bond the interest due thereon, and by many ordinances repeatedly recognized its indebtedness as herein set forth, and that he, your petitioner, acquired said bond for a valuable consideration and is now holder and owner of same.

Petitioner alleges that all the ordinances and contracts of the city hereinbefore referred to were legally and properly enacted and entered into after full compliance with all the requirements of law.

He avers further that the obligation of said city to pay its indebtedness as hereinbefore set forth was confirmed and fixed by the charters of said city granted by the State of Louisiana A. D. 1871 and A. D. 1878.

Petitioner alleges amicable demand in vain, and that the city has failed and refused to pay its indebtedness evidenced by said bond and remains indebted for the work done by said company as hereinbefore set forth, and that he (petitioner) is subrogated to all the rights and actions of said company against said city.

Petitioner alleges further that the laws of the State of Louisiana, so far as — same had any bearing on or relation to the contracts hereinbefore set up and to the rights and obligations therefrom resulting, were, by implication and operation of law, a part of
4 said contracts, and there was an implied contract between said city and the contractors that in event of a failure on the part of the city to comply with the terms of said contract the obligations thereof might be judicially enforced through the means and by the remedies then existing.

Petitioner avers that the law of Louisiana at the date of said contract provided sufficient means and adequate remedy for the enforcement of all rights thereunder arising, but petitioner alleges that article 209 of the constitution of Louisiana, adopted July 23, A. D. 1879, has impaired the obligation of said contracts by destroying all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

Petitioner avers it is claimed by said city that the entire revenues of the city under the operation of said constitutional limitation are not more than sufficient for its alimony, and petitioner avers that in consequence of such limitation no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

Petitioner alleges said article 209, so far as it limits municipal taxation, is as to him null and void, because it violates the Constitution of the United States, which prohibits all States from passing any law impairing the obligation of contracts.

5 Petitioner avers he is entitled to have said article 209 declared null and void, so that he may have a remedy by means of which to compel said city to pay its indebtedness to him.

The premises considered, he prays the city of Shreveport be cited to answer hereto; that, after all legal notices and delays, he have judgment against said city declaring said article 209 of the constitution of Louisiana — violation of the Constitution of the United

States, null and void, and condemning said city to pay him the sum and interest herein claimed, with costs.

He prays for all orders and decrees necessary and for general relief in the premises.

He avers said bond was destroyed by fire, & therefore cannot be annexed hereto.

(Sig.) A. H. LEONARD, *Att'y.*

Petition for Removal.

THE STATE OF LOUISIANA, *Parish of Caddo:*

In the First Judicial District Court.

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

To the hon. judge of said court:

Your petitioner, John R. Holmes, respectfully shows that he is the plaintiff in the above-entitled suit; that same was commenced by him on or about the 3rd day of July, A. D. 1886, in said court, and that he was, at the time of bringing the same, and still is, a citizen of the State of Texas and a resident thereof.

Petitioner shows that there is and was at the time said suit was brought a controversy therein between him and said defend-
6 ant, then and now a citizen of the State of Louisiana and resident thereof, and that the matter in dispute in their suit exceeds the sum of five hundred dollars exclusive of costs.

That he has reason to believe and does believe that from local influence or prejudice he will not be able to secure justice by reason of such local influence or prejudice.

That the said controversy raises a Federal question, the determination of which depends upon the construction of the Constitution of the United States.

That said cause can be fully and finally determined in the United States circuit court for the western district of Louisiana.

Your petitioner further represents that the suit has not been tried, but is pending in the said district court of said State of Louisiana, and that this petition is presented and filed in said court at the term at which said cause could be first tried and before the trial thereof.

Your petitioner further shows that he desires to remove said suit into the circuit court of the United States for the western district of Louisiana in pursuance of the acts of Congress in that behalf provided.

Your petitioner further shows that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, with Leon M. Carter, of Shreveport, La., as surety thereon, in the penal sum of two hundred and fifty dollars, conditioned as
7 by said acts of Congress required.

Your petitioner prays that said bond be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for the western district of Louisiana, pursuant to the acts of Congress in such cases

made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

(Sig.) A. H. LEONARD,
Attorney for Petitioner.

Oath of Attorney.

UNITED STATES OF AMERICA,
The State of Lousiana, First Jud'l District of Louisiana:

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

I, A. H. Leonard, being sworn, depose — say that I am the attorney-at-law for John R. Holmes, plaintiff in said cause, now pending in the 1st judicial district court, parish of Caddo, State of Louisiana; that said plaintiff is now absent from the State of Louisiana; that the contents of the above petition in said suit are true, and that I have reason to believe, and do believe, that from prejudice and local influence the said plaintiff will not be able to obtain justice in said State court.

(Sig.) A. H. LEONARD.

Subscribed and sworn to before me this 14 day of July, A. D. 1886.

(Sig.) W. P. FORD, *Clk.*

8 (Endorsement:) No. 104. U. S. circuit court. John R. Holmes *vs.* The City of Shreveport. Filed July 14th, 1886. E. J. Nolan, d'y cl'k.

9 *Petition.*

To the honorable the judges of the first judicial district of the State of Louisiana, holding sessions in and for the parish of Caddo:

The petition of John R. Holmes, a resident of Galveston, Texas, and a citizen of the State of Texas, with respect represents that the city of Shreveport, a municipal corporation created by the State of Louisiana, situated in the parish of Caddo, in said State, and a citizen of said State of Louisiana, is justly indebted to him in the sum of three thousand dollars, with eight per cent. per annum interest thereon from the 1st day of October, A. D. 1869, until paid, for this, viz:

On the 3rd day of June, A. D. 1869, the said city, in order to raise means for making improvements upon its streets, wharves, etc., through its council enacted an ordinance providing for the issuance of two hundred bonds of said city, each for the sum of one thousand dollars, bearing interest at the rate of eight per cent. per annum, payable to bearer ten years after date, and also providing for levying and collecting annually a tax sufficient to pay the interest on said bonds, and also for a sinking fund out of which to pay said bonds as they matured; all of which will be seen by reference to an authentic copy of said ordinance, hereto annexed as part hereof, marked "A."

Petitioner avers that thereupon said bonds were engraved, prepared, and signed by officers of said city, in accordance with requirements of said ordinance.

10 Petitioner avers further that subsequently and by various ordinances of its council said city provided for the improvement of its streets, avenues, wharves, etc., and particularly for the improvement of Commerce, Milam, Crockett, and Texas streets, Texas avenue, and of the wharf of said city, and entered into contracts with divers persons—among others, M. Baer, William Robson, D. J. Elder, the Shreveport City Railroad Company, and with various other citizens and property-holders of said city—to have said improvements made at a stipulated price; all of which is shown by authentic copies of said ordinances and contracts, hereto annexed as part hereof.

Petitioner avers the improvements and work so contracted for were made and was done by said contractors, were accepted by said city, enured greatly to its benefit, and were well worth the amount which the city had bound itself to pay therefor.

Petitioner avers further that the said city, in evidence of its indebtedness for the said work and improvements so as aforesaid done and made, issued and gave to the said M. Baer, Wm. Robson, D. J. Elder, the Shreveport City Railroad Company, and other citizens a number of said bonds so as aforesaid authorized by said ordinance of June 3, 1869, and among others, bond- No-. 14, 27, 28, of which copies are hereto annexed and made part hereof.

11 Petitioner avers that said bonds originally issued to Robson & Baer was by said Robson & Baer transferred and assigned for a valuable consideration before maturity and in due course of commercial transactions; that for several years said city paid to any holder of said bond the interest due thereon, and by many ordinances repeatedly recognized its indebtedness as herein set forth, and that he, your petitioner, acquired said bond for a valuable consideration, and is now holder and owner of same.

Petitioner alleges that all the ordinances and contracts of the city hereinbefore referred to were legally and properly enacted and entered into after full compliance with all the requirements of law.

He avers further that the obligation of said city to pay its indebtedness, as hereinbefore set forth, was confirmed and fixed by the charters of said city, granted by the State of Louisiana A. D. 1871 and A. D. 1878.

Petitioner alleges amicable demand in vain, and that the city has failed and refused to pay its indebtedness evidenced by said bond, and remains indebted for the work done by said Robson & Baer, as hereinbefore set forth, and that he (petitioner) is subrogated to all the rights and actions of said Robson & Baer against said city.

Petitioner alleges further that the laws of the State of Louisiana, so far as same had any bearing on or relation to the contracts

12 hereinbefore set up and to the rights and obligations therefrom resulting, were by implication and operation of law a part of said contracts, and there was an implied contract between said city and the contractors; that in event of a failure on the part

of the city to comply with the terms of said contract the obligations thereof might be judicially enforced throug- the means and by the remedies then existing.

Petitioner avers that the law of Louisiana at the date of said contract provided sufficient means and adequate remedy for the enforcement of all rights thereunder arising, but petitioner alleges that article 209 of the constitution of Louisiana, adopted July 23, A. D 1879, has impaired the obligations of said contracts by destroying all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

Petitioner avers it is claimed by said city that the entire revenues of the city under the operation of said constitutional limitation are not more than sufficient for its alimony, and petitioner avers that in consequence of such limitation no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

13 Petitioner alleges said article 209, so far as it limits municipal taxation, is as to him null and void, because it violates the Constitution of the United States, which prohibits all States from passing any law impairing the obligation of contracts.

Petitioner avers he is entitled to have said article 209 declared null and void, so that he may have a remedy by means of which to compel said city to pay its indebtedness to him.

The premises considered, he prays that the city of Shreveport be cited to answer hereto; that after all legal notices and delays he have judgment against said city declaring said article 209 of the constitution of Louisiana — violation of the Constitution of the United States, null and void, and condemning said city to pay him the sum and interest herein claimed, with costs. He prays for all orders and decrees necessary and for general relief in the premises. He avers said bonds were destroyed by fire and therefore cannot be annexed hereto.

(Sig.) A. H. LEONARD, *Att'y.*

Petition for Removal.

THE STATE OF LOUISIANA, *Parish of Caddo:*

In the First Judicial District Court.

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

To the hon judge of said court:

Your petitioner, John R. Holmes, respectfully shows that he is the plaintiff in the above-entitled suit; that same was com-

14 menced by him on or about the 3rd day of July, A. D. 1886, in said court, and that he was at the time of bringing same and still is a citizen of the State of Texas and a resident thereof.

Petitioner shows that there is, and was at the time said suit was brought, a controversy therein between him and said defendant, then and now a citizen of the State of Louisiana and resident thereof,

and that the matter in dispute in their suit exceeds the sum of five hundred dollars, exclusive of costs.

That he has reason to believe and does believe that from local influence or prejudice he will not be able to secure justice by reason of such local influence or prejudice.

That the said controversy raises a Federal question, the determination of which depends upon the construction of the Constitution of the United States.

That said cause can be fully and finally determined in the United States circuit court for the western district of Louisiana.

Your petitioner further represents that the suit has not been tried, but is pending in the said district court of said State of Louisiana, and that this petition is presented and filed in said court at the term at which said cause could be first tried and before the trial thereof.

Your petitioner further shows that he desires to remove said suit into the circuit court of the United States for the western
15 district of Louisiana in pursuance of the acts Congress in that behalf provided.

Your petitioner further shows that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, with Leon M. Carter, of Shreveport, La., as surety thereon, in the penal sum of two hundred and fifty dollars, conditioned as by said acts of Congress required.

Your petitioner prays that said bond be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for the said western district of Louisiana pursuant to the acts of Congress in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

(Sig.) A. H. LEONARD,
Attorney for Petitioner.

Oath of Attorney.

UNITED STATES OF AMERICA,
First Jud'l District of Louisiana:

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

I, A. H. Leonard, being sworn, depose — say that I am the attorney-at-law for John R. Holmes, plaintiff in said cause, now pending in the 1st judicial district court, parish of Caddo, State of Louisiana; that said plaintiff is now absent from the State of Louisiana; that the contents of the above petition in said suit are true, and that I have reason to believe and do believe that from prejudice
16 and local influence the said plaintiff will not be able to obtain justice in said State court.

(Sig.) A. H. LEONARD.

Subscribed and sworn to before me this 14 day of July, A. D. 1886.

(Sig.) W. P. FORD, *Clk.*

(Endorsement:) No. 105. U. S. circuit court. John R. Holmes *vs.* The City of Shreveport. Filed July 14th, 1886. E. J. Nolan, d'y clerk.

17 *Petition.*

To the honorable the judges of the first judicial district of the State of Louisiana, holding sessions in and for the parish of Caddo:

The petition of John R. Holmes, a resident of Galveston, Texas, and a citizen of the State of Texas, with respect represents that the city of Shreveport, a municipal corporation created by the State of Louisiana, situated in the parish of Caddo, in said State, and a citizen of said State of Louisiana, is justly indebted to him in the sum of three thousand dollars, with eight per cent. per annum interest thereon from the 1st day of October, A. D. 1869, until paid, for this, viz:

On the 3rd day of June, A. D. 1869, the said city, in order to raise means for making improvements upon its streets, wharves, etc., through its council enacted an ordinance providing for the issuance of two hundred bonds of said city, each for the sum of one thousand dollars, bearing interest at the rate of eight per cent. per annum, payable to bearer ten years after date, and also providing for levying and collecting annually a tax sufficient to pay the interest on said bonds, and also for a sinking fund out of which to pay said bonds as they matured; all of which will be seen by reference to an authentic copy of said ordinance, hereto annexed as part hereof, marked "H."

Petitioner avers that thereupon said bonds were engraved, prepared, and signed by officers of said city in accordance with the requirements of said ordinance.

18 Petitioner avers further that subsequently and by various ordinances of its council said city provided for the improvements of its streets, avenues, wharves, etc., and particularly for the improvement of Commerce, Milam, Crockett, and Texas streets, Texas avenue, and of the wharf of said city, and entered into contracts with divers persons—among others, M. Baer, William Robson, D. J. Elder, the Shreveport City Railroad Company, and with various other citizens and property-holders of said city—to have said improvements made at a stipulated price; all of which is shown by authentic copies of said ordinances and contracts, hereto annexed as part hereof.

Petitioner avers the improvements and work so contracted for were made and was done by said contractors, were accepted by said city, enured greatly to its benefit, and were well worth the amount which the city had bound itself to pay therefor.

Petitioner avers further that the said city, in evidence of its indebtedness for the said work and improvements so as aforesaid done and made, issued and gave to the said M. Baer, Wm. Robson, D. J. Elder, the Shreveport City Railroad Company, and other citizens a number of said bonds so as aforesaid authorized by said

ordinance of June 3, 1869, and among others, bond- Nos. 51, 52, 53, of which copies — hereto annexed and made part hereof.

Petitioner avers that said bond originally issued to the
19 Shreveport City R. R. Co. was by said company transferred and assigned for a valuable consideration before maturity and in due course of commercial transactions; that for several years said city paid to any holder of said bond the interest due thereon, and by many ordinances repeatedly recognized its indebtedness as herein set forth, and that he, your petitioner, acquired said bond for a valuable consideration and is now holder and owner of same.

Petitioner alleges that all the ordinances and contracts of the city hereinbefore referred to were legally and properly enacted and entered into after full compliance with all the requirements of law.

He avers further that the obligation of said city to pay its indebtedness, as hereinbefore set forth, was confirmed and fixed by the charters of said city, granted by the State of Louisiana A. D. 1871 and A. D. 1878.

Petitioner alleges amicable demand in vain, and that the city has failed and refused to pay its indebtedness evidenced by said bond and remains indebted for the work done by said company, as hereinbefore set forth, and that he (petitioner) is subrogated to all the rights and actions of said company against said city.

Petitioner alleges further that the laws of the State of Louisiana, so far as same had any bearing on or relation to the contracts hereinbefore set up and to the rights and obligations therefrom resulting, were, by implication and operation of law, a part of said contracts, and there was an implied contract between said city and the
20 contractors that in event of a failure on the part of the city to comply with the terms of said contract the obligations thereof might be judicially enforced through the means and by the remedies then existing.

Petitioner avers that the law of Louisiana at the date of said contract provided sufficient means and adequate remedy for the enforcement of all rights thereunder arising, but petitioner alleges that article 209 of the constitution of Louisiana, adopted July 23, A. D. 1879, has impaired the obligation of said contracts by destroying all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

Petitioner avers it is claimed by said city that the entire revenues of the city under the operation of said constitutional limitation are not more than sufficient for its alimony, and petitioner avers that in consequence of such limitation no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

Petitioner alleges said article 209, so far as it limits municipal taxation, is, as to him, null and void, because it violates the Constitution of the United States, which prohibits all States from passing any law impairing the obligation of contracts.

Petitioner avers he is entitled to have said article 209 declared

null and void, so that he may have a remedy by means of which to compel said city to pay its indebtedness to him.

21 The premises considered, he prays that the city of Shreveport be cited to answer hereto; that after all legal notices and delays he have judgment against said city declaring said article 209 of the constitution of Louisiana — violation of the United States, null and void, and condemning said city to pay him the sum and interest herein claimed, with costs. He prays for all orders and decrees necessary and for general relief in the premises.

He avers said bonds were destroyed by fire & therefore cannot be annexed hereto.

(Sig.) A. H. LEONARD, *Att'y.*

Petition for Removal.

THE STATE OF LOUISIANA, *Parish of Caddo:*

In the First Judicial District Court.

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

To the hon. judge of said court:

Your petitioner, John R. Holmes, respectfully shows that he is the plaintiff in the above-entitled suit; that the same was commenced by him on or about the 3rd day of July, A. D. 1886, in said court, and that he was at the time of bringing the same and still is a citizen of the State of Texas and a resident thereof.

Petitioner shows that there is and was at the time said suit was brought a controversy therein between him and said defendant, then and now a citizen of the State of Louisiana and a resident thereof, and that the matter in dispute in their suit exceeds the sum of five hundred dollars, exclusive of costs.

22 That he has reason to believe and does believe that from local influence or prejudice he will not be able to secure justice by reason of such local influence or prejudice.

That the said controversy raises a Federal question, the determination of which depends upon the construction of the Constitution of the United States.

That said cause can be fully and finally determined in the United States circuit court for the western district of Louisiana.

Your petitioner further represents that the suit has not been tried, but is pending in the said district court of said State of Louisiana, and that this petition is presented and filed in said court at the term at which said cause could be first tried and before the trial thereof.

Your petitioner further shows that he desires to remove said suit into the circuit court of the United States for the western district of Louisiana in pursuance of the acts of Congress in that behalf provided.

Your petitioner further shows that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, with Leon M. Carter, of Shreveport, La., as surety thereon, in the

penal sum of two hundred and fifty dollars, conditioned as by said acts of Congress required.

Your petitioner prays that said bond be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for the said western
23 & 24 district of Louisiana pursuant to the acts of Congress in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

(Sig.) A. H. LEONARD,
Attorney for Petitioner.

Oath of Attorney.

UNITED STATES OF AMERICA,
The State of Louisiana, First Jud'l District of Louisiana:

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

I, A. H. Leonard, being sworn, depose — say that I am the attorney-at-law for John R. Holmes, plaintiff in said cause, now pending in the 1st judicial district court, parish of Caddo, State of Louisiana; that said plaintiff is now absent from the State of Louisiana; that the contents of the above petition in said suit are true, and that I have reason to believe and do believe that from prejudice and local influence the said plaintiff will not be able to obtain justice in said State court.

(Sig.) A. H. LEONARD.

Subscribed and sworn to before me this 14 day of July, A. D. 1886.
(Sig.) W. P. FORD.

(Endorsement:) No. 106. U. S. circuit court. John R. Holmes *vs.* The City of Shreveport. Filed July 14th, 1886. E. J. Nolan, d'y cl'k.

25 *Petition.*

To the honorable the judges of the first judicial district of the State of Louisiana, holding sessions in & for the parish of Caddo:

The petition of John R. Holmes, a resident of Galveston, Texas, and a citizen of the State of Texas, with respect represents that the city of Shreveport, a municipal corporation created by the State of Louisiana, situated in the parish of Caddo, in said State, and a citizen of said State of Louisiana, is justly indebted to him in the sum of three thousand dollars, with eight per cent. per annum interest thereon from the 1st day of October, A. D. 1869, until paid, for this, viz:

On the 3rd day of June, A. D. 1869, the said city, in order to raise means for making improvements upon its streets, wharves, etc., through its council enacted an ordinance providing for the issuance of two hundred bonds of said city, each for the sum of one thousand dollars, bearing interest at the rate of eight per cent. per annum,

payable to bearer ten years after date, and also providing for levying and collecting annually a tax sufficient to pay the interest on said bonds, and also for a sinking fund out of which to pay said bonds as they matured; all of which will be seen by reference to an authentic copy of said ordinance, hereto annexed as part hereof, marked "A."

Petitioner avers that thereupon said bonds were engraved, prepared, and signed by officers of said city in accordance with the requirements of said ordinance.

26 Petitioner avers further that subsequently and by various ordinances of its council said city provided for the improvement of its streets, avenues, wharves, etc., and particularly for the improvement of Commerce, Milam, Crockett, and Texas streets, Texas avenue, and of the wharf of said city, and entered into contracts with divers persons—among others, M. Baer, William Robson, D. J. Elder, the Shreveport City Railroad Company, and with various other citizens and property-holders of said city—to have said improvements made at a stipulated price; all of which is shown by authentic copies of said ordinances and contracts, hereto annexed as part hereof.

Petitioner avers the improvements and work so contracted for were made and was done by said contractors, were accepted by said city, enured greatly to its benefit, and were well worth the amount which the city had bound itself to pay therefor.

Petitioner avers further that the said city, in evidence of its indebtedness for the said work and improvements so as aforesaid done and made, issued and gave to the said M. Baer, Wm. Robson, D. J. Elder, the Shreveport City Railroad Company, and other citizens a number of said bonds so as aforesaid authorized by said ordinance of June 3, 1869, and among others, bond- Nos. 32, 33, 34, of which copies — hereto annexed and made part hereof.

27 Petitioner avers that said bonds originally issued to Robson & Baer was by said Robson & Baer transferred and signed for a valuable consideration before maturity and in due course of commercial transactions; that for several years said city paid to any holder of said bond the interest due thereon, and by many ordinances repeatedly recognized its indebtedness as herein set forth, and that he, your petitioner, acquired said bond for a valuable consideration and is now holder and owner of same.

Petitioner alleges that all the ordinances and contracts of the city hereinbefore referred to were legally and properly enacted and entered into after full compliance with all the requirements of law.

He avers further that the obligation of said city to pay its indebtedness, as hereinbefore set forth, was confirmed and fixed by the charters of said city granted by the State of Louisiana A. D. 1871 and A. D. 1878.

Petitioner alleges amicable demand in vain, and that the city has failed and refused to pay its indebtedness evidenced by said bond and remains indebted for the work done by said Robson & Baer, as hereinbefore set forth, and that he (petitioner) is subrogated to all the rights and actions of said Robson & Baer against said city.

Petitioner alleges further that the laws of the State of Louisiana,

so far as same had any bearing on or relation to the contracts hereinbefore set up and to the rights and obligations therefrom
28 resulting, were by implication and operation of law a part of said contracts, and there was an implied contract between said city and the contractors that in event of a failure on the part of the city to comply with the terms of said contract the obligations thereof might be judicially enforced through the means and by the remedies then existing.

Petitioner avers that the law of Louisiana at the date of said contract provided sufficient means and adequate remedy for the enforcement of all rights thereunder arising, but petitioner alleges that article 209 of the constitution of Louisiana, adopted July 23, A. D. 1879, has impaired the obligation of said contracts by destroying all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

Petitioner avers it is claimed by said city that the entire revenues of the city under the operation of said constitutional limitation are not more than sufficient for its alimony, and petitioner avers that in consequence of such limitation no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

Petitioner alleges said article 209, so far as it limits municipal taxation, is, as to him, null and void, because it violates the Constitution of the United States, which prohibits all States from passing any law impairing the obligation of contracts.

29 Petitioner avers that he is entitled to have said article 209 declared null and void, so that he may have a remedy by means of which to compel said city to pay its indebtedness to him.

The premises considered, he prays that the city of Shreveport be cited to answer hereto; that, after all legal notices and delays, he have judgment against said city declaring said article 209 of the constitution of Louisiana — violation of the Constitution of the United States, null and void, and condemning said city to pay him the sum and interest herein claimed, with costs.

He prays for all orders and decrees necessary and for general relief in the premises.

He avers said bonds were destroyed by fire & therefore cannot be annexed hereto.

(Sig.) A. H. LEONARD, *Att'y.*

Petition for Removal.

STATE OF LOUISIANA, *Parish of Caddo:*

In the First Judicial District Court.

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

To the hon. judge of said court:

Your petitioner, John R. Holmes, respectfully shows that he is the plaintiff in the above-entitled suit; that same was commenced by

him on or about the 3rd day of July, A. D. 1886, in said court, and that he was at the time of bringing same and still is a citizen of the State of Texas and a resident thereof.

Petitioner shows that there is and was at the time said suit
30 was brought a controversy therein between him and said defendant, then and now a citizen of the State of Louisiana and resident thereof, and that the matter in dispute in their suit exceeds the sum of five hundred dollars exclusive of costs.

That he has reason to believe and does believe that from local influence or prejudice he will not be able to secure justice by reason of such local influence or prejudice.

That the said controversy raises a Federal question, the determination of which depends upon the construction of the Constitution of the United States.

That said cause can be fully and finally determined in the United States circuit court for the western district of Louisiana.

Your petitioner further represents that the suit has not been tried, but is pending in the said district court of said State of Louisiana, and that this petition is presented and filed in said court at the term at which said cause could be first tried and before the trial thereof.

Your petitioner further shows that he desires to remove said suit into the circuit court of the United States for the western district of Louisiana in pursuance of the acts of Congress in that behalf provided.

Your petitioner further shows that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, with Leon M. Carter, of Shreveport, La., as surety thereon, in the penal sum of two hundred and fifty dollars, conditioned as
31 by said acts of Congress required.

Your petitioner prays that said bond be accepted as good and sufficient, and that the said suit may be removed into the next circuit court of the United States in and for the western district of Louisiana, pursuant to the acts of Congress in such cases made and provided, and that no further proceedings may be had therein in this court; and your petitioner will ever pray, etc.

(Sig.) A. H. LEONARD,
Attorney for Petitioner.

Oath of Attorney.

UNITED STATES OF AMERICA,
The State of Louisiana, First Jud'l District of Louisiana:

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT.

I, A. H. Leonard, being sworn, depose — say that I am the attorney-at-law for John R. Holmes, plaintiff in said cause, now pending in the 1st judicial district court, parish of Caddo, State of Louisiana; that said plaintiff is now absent from the State of Louisiana; that the contents of the above petition in said suit are true, and that I have reason to believe and do believe that from prejudice and local

influence the said plaintiff will not be able to obtain justice in said State court.

(Sig.) A. H. LEONARD.

Subscribed and sworn to before me this 14 day of July, A. D. 1886.

(Sig.) W. P. FORD, *Clk.*

32 (Endorsement:) No. 107. U. S. circuit court. John R. Holmes *vs.* The City of Shreveport. Filed July 14th, 1886. E. J. Nolan, d'y cl'k.

Plea of Prescription.

In the U. S. Circuit Court, Western District of Louisiana.

JNO. R. HOLMES *vs.* CITY OF SHREVEPORT. } No-. 104, 105, 106, & 107. Consolidated.

Now comes defendant in above cause and, as a peremptory exception, pleads the prescription of one, three, five, and ten years in bar of plaintiff's action herein.

Wherefore defendant prays that this suit be dismissed at the plaintiff's cost.

(Sig.) E. H. RANDOLPH,
ALEXANDER & BLANCHARD,
Attorneys for Defendant.

(Endorsement:) No-. 104, '5, '6, & '7. Jno. R. Holmes *versus* City of Shreveport. Plea of prescription. Filed July 30, '86. (Sig.) J. W. Wheaton, cl'k.

33 *Answer.*

In U. S. Circuit Court, 5th Circuit, Western District of La.

JNO. R. HOLMES *vs.* CITY OF SHREVEPORT. } Nos. 104, '5, '6, & '7. Consolidated.

Now comes defendant and, for answer to plaintiff's petition, denies all and singular the allegations therein contained, and specially that pl'ff is a *bona fide* holder before maturity of the bonds sued on.

Further answering, respondent specially denies that the city of Shreveport had any right, power, or authority to issue or put into circulation the bonds or instruments sued upon herein, and avers that the same were issued by the trustees and officers of said city without warrant or authority of law and are absolutely null & void in law and in no manner binding upon said city.

Further answering, respondent alleges that even if the city had possessed the power to make or issue the bonds in question, which is denied, they are still illegal, invalid, and not binding on said city, for the reason that at the time the bonds were so made & issued and debts contracted no provision was made in the ordinance creating

the debt or means provided for the payment of the principal & interest of the said bonds or debt so contracted, as required by section 2448 of the Revised Statutes of Louisiana; that the provisions of said statute is prohibitory in its nature, and said bonds, having
34 been issued in contravention thereof, are null and void.

Further answering, respondent specially denies that there was or is any privity whatsoever existing between plaintiff, as holder of the bonds sued on herein, and the contractors, who are alleged in the petition to have performed certain works under contract with the city, or that plaintiff has any right of action against respondent for work done or labor performed by other persons, and to which contracts plaintiff was no party; that if any such right of action does exist, which is denied, then that the said contracts were made in violation of the said prohibitory law above referred to (sect. 2448), were illegal, void, and in no manner binding upon the city of Shreveport.

Wherefore respondent prays that plaintiff's demand be rejected at his cost.

(Sig.) E. H. RANDOLPH,
" ALEXANDER & BLANCHARD,
Att'ys for Defendant.

(Endorsement:) Nos. 104, '5, '6, & '7, consolidated. Jno. R Holmes *vs.* City of Shreveport. Answer. Filed July 30, '86. (Sig.) J. W. Wheaton, cl'k.

35 *Judgment.*

U. S. Circuit Court, Western Dist. La.

JOHN R. HOLMES *vs.* THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, & 107. Consolidated.

In this case, by reason of the law & the evidence being in favor of the plaintiff & against the defendant, and for the reasons given in opinion herein read, it is ordered, adjudged, & decreed that the motion for recusation herein filed, which has been waived by defendant, be overruled, & that the plea of prescription herein filed be also overruled; and it is further ordered, adjudged, & decreed that the plaintiff, John R. Holmes, have and recover of the defend't, The City of Shreveport, the full sum of twelve thousand dollars, with five per cent. per annum interest thereon from Oct'r 1st, A. D. 1877, until paid, and all costs of suit.

It is further ordered, adjudged, & decreed that article 209 of the constitution of Louisiana, adopted A. D. 1879, is, and is hereby decreed to be, unconstitutional, null, and void, so far as same imposes a limit on municipal taxation or in any manner affects the debt due by defendant to plaintiff, which is recognized by this judgment.

Done, read, & signed in open court on this the 7th day of March, A. D. 1887.

(Sig.) ALECK BOARMAN, *Judge.*

Endorsement: Nos. 104, 105, 106, & 107, consolidated.
36 John R. Holmes *vs.* The City of Shreveport. Judgment. Filed M'ch 7th, 1887. (Sig.) J. W. Wheaton, cel'k.

Statement of Facts.

In U. S. Circuit Court, Western Dist. La.

JNO. R. HOLMES
vs.
CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107.

By agreement of counsel these four suits were consolidated, jury was waived, and motion for recusation abandoned and dismissed. The defendant offered no evidence.

Statement of facts on pleas of prescription.—Prescription as against plaintiffs was interrupted by a judicial demand and citation on Aug. 30, 1884, and prescription has not accrued.

Statement of facts on merits.—Defendant is a municipal corporation.

In 1869, 1870, in pursuance of ordinances legally enacted and promulgated, the defendant caused to be let several contracts for public works, such as grading and otherwise improving the streets and wharves of the city.

By written agreement the contractors undertaking the public works which were provided for in the ordinances were to receive from defendant for the amount due them for works, labor done, and material furnished a part in cash and the balance in the ten-year coupon one-thousand-dollar bonds of the city at par.

37 The works having been satisfactorily performed and accepted by the city, a number of such bonds were executed and given to said contractors to evidence the amounts due them in accordance with the agreement of the parties.

The defendant corporation has had the benefit and enjoyment of the works, and the credit price represented and evidenced by these bonds has never been paid to any one.

The several contractors to whom these bonds were given transferred them by delivery before maturity for value, and plaintiff acquired and became the holder of ten of said bonds for value and in course of business.

Up to and including the year 1877 the city levied annually a tax to provide means for paying the interest and also to provide a sinking fund for the payment of the principal of said bonds, and the interest up to that time was paid to any one holding them; up to and including said year 1877 the bonds were also annually placed in the city's statement of liabilities and on its published budgets, and some of said bonds were taken up by the city.

The defendant corporation issued in the year 1866 bonds for $500 each, payable in five, ten, and fifteen years, and same were placed in annual statements and in the published budgets.

The following is a copy of the bonds given to said contractors and now held by plaintiff:

"$1,000. $1,000.

STATE OF LOUISIANA, *City of Shreveport:*

38 Municipal loan for improvement and extension of the avenues of trade and other purposes.

Know all men by these presents that the mayor and trustees of the city of Shreveport acknowledges to owe —— —— or bearer one thousand dollars, lawful money of the United States, which the said mayor and trustees promise to pay, at the controller's office, in the city of Shreveport, on the 1st day of October, 1879, with interest thereon at eight per cent. per annum, payable semi-annually at the Bank of New York, in the city of New York, on presentation of the coupons hereto attached.

For the performance of this obligation the faith and property of the corporation of Shreveport are irrevocably pledged and a tax is ordered to be levied on all the taxable property of said city annually to pay the said interest and to create a sinking fund to pay the principal when the same becomes due. This bond is issued in obedience to an ordinance of the mayor and trustees of said city, adopted on the 3rd day of June, 1869, for the purpose of raising means to make such improvements as the growth of the city demands.

In witness whereof this bond is signed by the mayor and controller of said city of Shreveport and approved by the finance committee and the seal of the city affixed the 1st day of October, 1869.

(Sig.) J. B. GILMORE, *Mayor.*
(Sig.) C. H. SPILKER, *Controller.*

Approved:

THOS. H. MORRIS,
J. C. MONCURE,
J. N. HOWELL,
Finance Committee."

39 On the back of the bond is following endorsement:

"*Bond of the City of Shreveport.*

"No. 12. $1,000, payable October 1st, 1879. Interest at 8 per cent. per annum, payable at the Bank of New York, in the city of New York, April and October.

"This bond is one of two hundred of like denomination, and the ordinance under which they are issued provides for their payment as well as the payment of interest, as required by law, by setting apart from the revenue of the city the sum of thirty-six thousand dollars annually to pay said interest punctually and to create a sinking fund to pay the principal.

"The ordinance providing for the payment of the principal and interest of this bond is irrevocable until the same is fully paid.

"The ordinance providing for the interest and principal of any debt created by any board of police or authorities of incorporated towns and cities shall remain bind- — in force until the debt and interest is paid." Acts of the State of Louisiana, session of 1855, sec. 5, page 326.

Under an ordinance of June 3, 1869, the series of bonds of which the ten bonds held by plaintiff are a part were issued. The following is section 4 of that ordinance:

"Be it further ordained that, in order to fully provide for the payment of the principal and interest of said bonds as the board is required to do by law, there shall be set apart from the revenues of the city semi-annually the sum of eight thousand dollars to meet the payment of the interest upon said bonds as the same becomes due; and, to meet the payment of the principal of said bonds, there shall be set apart from the said revenues the sum of twenty thousand dollars annually as a sinking fund, and, in order to raise the amount of interest as the same becomes due and the amount necessary to create the said sinking fund, it shall be the duty of the mayor and trustees of the city of Shreveport to levy annually upon all taxable property in the city of Shreveport such amount of tax as shall fully provide for the payment of said interest and the creation of said sinking fund, in addition to the payment of the current and ordinary expenses of the city government."

The defendant corporation has no property subject to execution, and the revenues of the city, under the limitation on municipal corporation taxation imposed by article 209 of the constitution of Louisiana, adopted A. D. 1879, are not more than sufficient for the alimony of the city.

The defendant corporation, at the time these bonds were given to the contractors, had power to levy and collect taxes on all property in the city without limit.

The charter of defendant corporation as it existed at the dates hereinbefore stated is found in the several acts of the Legislature of Louisiana, viz: Act No. 67, session 1839, page 200; act No. act No. 190, session 1850, page 123; act No. 232, session 1853, page 198; act No. 156, session 1859, page 120; act No. 146, session 1866, page —.

Subsequently to said dates hereinbefore stated and by an act of the Legislature of Louisiana approved April 27, 1871, the territory previously known as Shreveport, together with other territory, was designated the city of Shreveport, and the inhabitants constituted a body politic by the name and style of the City of Shreveport and invested with certain rights and privileges, subject to certain duties and obligations, as shown by said act.

(Sig.) ALECK BOARMAN, *Judge.*

(Endorsement:) Nos. 104, 105, 106, & 107. John R. Holmes *vs.* City of Shreveport. Statement of fact. Filed March 28, '87. (Sig.) J. W. Wheaton, cl'k.

42 *Petition for Writ of Error.*

UNITED STATES OF AMERICA,
Fifth Circuit, Western District of La.:

To the hon. justices of the Supreme Court of the United States:

And now comes the city of Shreveport, a municipal corporation of the State of Louisiana, by Alexander & Blanchard and E. H. Randolph, its attorneys, and complain- that in the records & proceedings and also in the rendition of judgment in a suit between John R. Holmes, plaintiff, and said City of Shreveport, defendant, tried in the circuit court of the United States for said fifth circuit, western district of Louisiana, at the February term thereof, 1887, and in which judgment was rendered against said city of Shreveport on the 7th day of March, 1887, manifest error hath intervened, to the great damage of the said city of Shreveport.

Wherefore it prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

(Sig.) ALEXANDER & BLANCHARD,
" E. H. RANDOLPH,
Attorneys for City of Shreveport.

Allowed:
(Sig.) ALECK BOARMAN, *Judge.*

(Endorsement:) Nos. 104, 105, 106, & 107, consolidated.
43 Jno. R. Holmes *vs.* City of Shreveport. Petition for writ of error. Filed March 14th, '87. J. W. Wheaton, clerk.

Bond.

Supreme Court of the United States.

JOHN R. HOLMES
vs.
CITY OF SHREVEPORT. } Nos. 104, 105, 106, & 107 (Cons.)

Know all men by these presents that we, The City of Shreveport, as principal, and E. M. Smith and W. P. Ford, as securities, are held and firmly bound unto John R. Holmes, of Galveston, Texas, in the sum of two hundred & fifty dollars, to be paid to the said Jno. R. Holmes, his executors or administrators; to which payment, well & truly to be made, we bind ourselves and each of us, jointly and severally, and our & each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 14th day of March, 1887.

Whereas the above-named City of Shreveport hath prosecuted a writ of error in the Supreme Court of the United States to recover the judgment rendered in the above-entitled action by the circuit court of the United States for the fifth circuit & western district of Louisiana:

44 Now, therefore, the condition of this obligation is such that if the above-named City of Shreveport shall prosecute its

writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force & virtue.

(Sig.) A. CURRIE, [SEAL.]
Mayor of the City of Shreveport.
(Sig.) W. P. FORD. [SEAL.]
" E. M. SMITH. [SEAL.]

Sealed and delivered in presence of—
(Sig.) T. ALEXANDER.
" THOMAS J. LEATON.

UNITED STATES OF AMERICA,
Fifth Circuit, Western Dist. of La.:

E. M. Smith & W. P. Ford, being duly sworn, depose & say, and each for himself saith, that he is worth the sum of one thousand dollars over & above all his just debts & liabilities.

(Sig.) W. P. FORD.
" E. M. SMITH.

Sworn to & subscribed before me this 14 day of March, 1887.
[SEAL.] (Sig.) J. B. SLATTERY,
U. S. Commissioner.

I approve the above bond & the sufficiency of the sureties thereto.
(Sig.) ALECK BOARMAN, *Judge.*

(Endorsement:) Nos. 104, 105, 106, & 107. Jno. R. Holmes *vs.* City of Shreveport. Bond. Filed March 14, '87. (Sig.) J. W. Wheaton, clerk.

45 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To John R. Holmes, Greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, wherein the City of Shreveport is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this the 14th day of March, A. D. 1887.

(Sig.) ALECK BOARMAN, *Judge.*

Marshal's Return.

Rec'd this citation on writ of error in office M'ch 17th, 1887, & on the 18th day of same month & year I served a certified copy of same

on A. H. Leonard, att'y for plaintiff (def't in error), by leaving same in his hands in the city of Shreveport, La.

(Sig.) A. C. GIBSON,
U. S. Marshal.

46 (Endorsement:) The City of Shreveport *vs.* Jno. R. Holmes. Citation. Filed March 14, '87. (Sig.) J. W. Wheaton, clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the fifth circuit, western district of Louisiana, Greeting:

Because that in the records & process, and also in the rendering of judgment in a suit before you or some of you, between The City of Shreveport, Louisiana, plaintiff in error, and John R. Holmes, a citizen of the State of Texas, defendant, a manifest error has intervened, to the great damage of the said plaintiff in error, as in his complaint stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full & speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and
47 this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, being present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Washington aforesaid, this the 14th day of March, in the year of our Lord one thousand eight hundred & eighty-seven, and of the Independence of the United States the one hundred and eleventh.

(Sig.) J. W. WHEATON, *Clerk.*

(Endorsement:) Nos. 104, 105, 106, & 107, consolidated. City of Shreveport *vs.* Jno. R. Holmes. Writ of error. Filed March 14, '87. (Sig.) J. W. Wheaton, cl'k.

48 *Agreement of Counsel.*

THE STATE OF LOUISIANA, *Parish of Caddo:*

U. S. Circuit Court, 5th Circuit, Western District La.

Agreement between the plaintiffs in various suits against the city of Shreveport and the said city, pl'ffs being represented herein by A. H. Leonard, their att'y, and defendant by their attorney-, Alexander & Blanchard and E. H. Randolph.

It is understood & agreed that the said Leonard will, on his motion,

have the various suits of E. H. Carter *vs.* The City of Shreveport consolidated, so as to be in effect one suit;

The various suits of John R. Holmes *vs.* Said City consolidated, so as to be in effect one suit;

And the various suits of Jno. B. Crooks *vs.* Said City consolidated, so as to be in effect one suit.

That said Leonard will also take same course in regard to another suit—on eighteen bonds of said city—which will be filed to-morrow in name of E. H. Carter, & which is to be consolidated with the other suits of said Carter against said city.

It is understood & agreed that said defendant will file to-morrow morning answers in said suits and raise thereon no question as to the right of plaintiffs in said suits to sue as owners of the claims therein sued on.

It is further understood & agreed that on the issues so made a trial shall be had at the next term of the circuit court of the United States for the fifth circuit & western district of Louisiana by the court, trial by jury in said causes being hereby waived, and that either party may offer in evidence the evidence adduced on the trial of the case of Simon Levy *vs.* The City of Shreveport, No. 28
49 on the docket of said court, or any portion thereof, and such other evidence as either party may choose to offer, subject to legal objections as to competency & admissibility.

It is further understood that in the event a writ of error is sued out from the judgment which may be rendered in said causes or any one of them such writ of error shall have the full effect of a supersedeas, provided it is sued out within the time fixed by law for suing out a writ of error to operate as a supersedeas, on a bond for an amount sufficient to cover costs; and it — further agreed & understood that in the event a writ of error is sued out on said causes or any one of them such causes or cause shall be submitted to the Supreme Court of the United States on briefs to be filed within fifteen days after the commencement of the term to which said cause is or causes are made returnable.

It is further agreed that the case Nathan Simmons *vs.* The City of Shreveport shall not be tried until after final judgment of Supreme Court in the event the other cases herein referred to are taken to said Court.

July 26, '86.

(Sig.) A. H. LEONARD, *Att'y for Pl'ffs.*
" ALEXANDER & BLANCHARD,
" E. H. RANDOLPH,
Att'ys for Defendant.

Additional Agreement of Counsel.

In cases—

J. R. HOLMES *vs.* CITY OF SHREVEPORT.
J. B. CROOKS *vs.* " " "
E. H. CARTER *vs.* " " "

50 It is agreed that plaintiffs may offer, in addition to evidence previously adduced by them, following evidence, viz: The records in cases Simon Levy, M. A. Hackett, A. H. Leonard, Jno. J. Horan, S. Herold, John J. Gragard, J. G. McWilliams, R. T. Buckner, W. P. Ford, Leon M. Carter, Mattie L. Parsons, ex't'rs; G. W. Robinson, Kate O. Holmes, S. Herold, Mattie L. Carter, Edward Jacobs, Ben. Jacobs, J. F. Looney, R. R. Riggs, W. C. Harris, A. W. O. Hicks, & Wm. Enders *vs.* City of Shreveport, & also the citations in said cases, with returns thereon, & that said evidence shall be considered as having been offered on trial had.

(Sig.) ALEXANDER & BLANCHARD,
Att'ys for Def'd't.

(Endorsement:) No. 104. John R. Holmes *vs.* City of Shreveport. Agreement of counsel. Filed July 29, '86, & Mar. 2, '87. (Sig.) J. W. Wheaton, cl'k.

51 Supreme Court of the United States.

JOHN R. HOLMES *vs.* CITY OF SHREVEPORT. } Nos. 104, 105, 106, & 107. (Cons.)

Know all men by these presents that we, The City of Shreveport, as principal, and E. M. Smith and W. P. Ford, as securities, are held & firmly bound unto John R. Holmes, of Galveston, Texas, in the sum of two hundred & fifty dollars, to be paid to the said Jno. R. Holmes, his executors or administrators; to which payment, well & truly to be made, we bind ourselves and each of us, jointly and severally, and our & each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 14th day of March, 1887.

Whereas the above-named City of Shreveport hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the cir-
52 cuit court of the United States for the fifth circuit & western district of Louisiana:

Now, therefore, the condition of this obligation is such that if the above-named City of Shreveport shall prosecute its said writ of error to effect and answer all costs & damages if it shall fail to make good

its plea, then this obligation shall be void; otherwise to remain in full force & virtue.

A. CURRIE, [SEAL.]
Mayor of the City of Shreveport.
W. P. FORD. [SEAL.]
ED. M. SMITH. [SEAL.]

Sealed and delivered in presence of—
T. ALEXANDER.
THOMAS J. LEATON.

UNITED STATES OF AMERICA,
Fifth Circuit, Western Dist. of La.:

E. M. Smith & W. P. Ford, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars over & above all his just debts & liabilities.

ED. M. SMITH.
W. P. FORD.

Sworn to & subscribed before me this 14 day of M'ch, 1887.
[Seal U. S. Commissioner, Western District La.]

J. B. SLATTERY,
U. S. Commissioner.

I approve the above bond & the sufficiency of the sureties thereto.
ALECK BOARMAN, *Judge.*

53 & 54 [Endorsed:] Nos. 104, 105, 106, & 107. Jno. R. Holmes *vs.* City of Shreveport. 14. Bond. Filed March 14, '87. J. W. Wheaton, clerk.

55 UNITED STATES OF AMERICA, *ss:*

To John R. Holmes, Greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana, wherein the city of Shreveport is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this the 14th day of March, A. D. 1887.

[Seal U. S. Circuit Court for the Western Dist. of La.]

ALECK BOARMAN, *Judge.*

56 [Endorsed:] No. 122. C. C. The City of Shreveport *vs.* Jno. R. Holmes. 15. Citation. Filed March 14, '87. J. W. Wheaton, clerk.

Rec'd this citation on writ of error, in office, M'ch 17th, 1887, & on the 18th day of same month & year I served a certified copy of same on A. H. Leonard, att'y for plaintiff (def't in ereor), by leaving same in his hands in the city of Shreveport, La.

A. C. GIBSON,
U. S. Marshal

57 *Opinion of Judge.*

U. S. Circuit Court, Western District Louisiana.

JNO. R. HOLMES
vs.
CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107.

A. H. Leonard, A. D. Land, for plaintiff; T. Alexander, E. H. Randolph, for defendant.

By agreement, jury waived and the four cases consolidated.

The pleading, issues, and facts in the case are substantially the same as those in the case of Dorian *vs.* The City of Shreveport, 28th Fed. Reporter, 287. The bonds and ordinances relating to their issuance were fully recited in that case. The several statutes vesting powers in the defendant city make up the charter by which we are to test and measure the liability of the corporation for the acts of its agents in entering into the contracts in pursuance of which the bonds held by plaintiff were executed. Dealers in municipal bonds or other such securities and evidences of indebtedness are charged with notice as to the power of the corporation to incur and bind the city for the debt evidenced by such instruments.

Under the agreement made with the several persons to whom these bonds were issued they were to do certain public work in the way of grading or otherwise improving the streets of the city, and were to be paid half in cash and the balance in the ten-year bonds at par. The work *work* was satisfactorily performed and the
58 indebtedness evidenced by these bonds has never been paid.

The defense is in the nature of a demurrer. The defendant, offering no evidence, relies upon two grounds in law for relief: First, upon the plea *ultra vires;* second, upon the prohibitory act of 1855, which forbids a municipal corporation to incur a debt without providing in the ordinance creating the debt the means of paying the principal and interest. The law, *ultra vires*, is a shield to the tax-payers of a corporation; when properly administered it should enable them to avoid the payment of a debt, whatever may be the form of the instrument used to evidence the liability, which has been contracted beyond the scope of the corporate powers. The reason and force of this principle of law lies in the fact that the power to bind the corporation for a debt carries with it the power to pay the debt out of the revenues collected from the tax-payers. No tax should be collected to pay a debt not lawfully binding on the corporation; hence the plea *ultra vires* will be good against the payment of such a liability.

Municipal corporations possess the following powers: First,

powers granted in express words and such as are fairly or necessarily implied from the language used in enumerating and vesting the several express grants; second, such powers as are essential to the declared purposes of the corporation. In the statutes
59 which made up the charter of defendant city at the time these bonds were issued we find powers expressly given of a more extensive kind than usually belong to city governments. Among them we find the power "to erect such public works and buildings for the use and advantage of the town as they may deem expedient;" * * * "to give bonds and receive bonds, which shall be as effectual in law as other bonds given under the laws of the State; to levy an annual tax, not limited in amount, from 1853 until after time these bonds were issued, for the comfort, improvement, and well regulating of the town." The mayor was required to sign all notes and other obligations binding on the corporation. The mayor and trustees "have power from time to time to enact and provide for the promulgation of such by-laws and ordinances, not inconsistent with the laws and Constitution of the State and United States, as they may deem proper in relation to the public markets of said town, to the landings, streets, alleys, and highways therein, and to the opening, widening, draining, filling up, keeping in order, and improving the same;" * * * "to open, extend, pave, plank, macadamize, or otherwise improve and adorn the streets, alleys, and wharves of the city." In Reynolds *vs.* Shreveport, 13 A., 426, the court held that the city could incur a debt for grading the streets, and in discussing the powers we have mentioned said they were "of the most ample description." In the face of these liberal grants to defendant city it cannot be denied
60 that the agents of the corporation were fully authorized to contract for the public works performed by the several contractors to whom the bonds were issued.

The numerous authorities cited in the Dorian case, some of them from the courts of Louisiana, show abundantly the power of the city's agents to give warrants, vouchers, or other evidences of indebtedness binding on the city to anticipate the current revenues and to evidence the amounts due on a credit, whether it be long or short, in pursuance of contracts for public works made by the city's agents within the scope of their official powers. The defendant, among other cases, cites the case of Wilson *vs.* City of Shreveport. A careful consideration of that case does not appear to avail anything for the defense against the bonds now held by plaintiff. In that case the bonds were alleged, in themselves, as commercial paper, to be a basis for recovery. Those bonds were issued in 1867. The interest was being paid on them at the time these bonds were issued, and the court decided the suit on them in 1877. In this case the bonds were issued in 1869, and the city provided for and continued to pay the interest on them to any one holding them until 1878. When the bonds came into the hands of plaintiff the Wilson suit had not been filed and there was nothing known in the history of their origin, issue, or treatment by the city to depreciate them,
61 or in any way dishonor them in public confidence or commerce. All the parties to the contract were in good faith,

and if the city's agents had no authority to bind the corporation on such instruments for debts lawfully due public creditors neither the city nor the persons who performed public works nor the public knew or suspected the absence of such powers. It is in evidence that the city's agents at the time these bonds came into the hands of plaintiff had been for many years issuing commercial notes or bonds, and that the constituents of the corporation had from time to time been paying the principal and interest of the same. The payment of the annual interest on these bonds to any holder of them, however willingly it may have been paid, could not, if the bonds were given to evidence a debt not lawfully binding on the corporation, operate in law as a ratification of them, nor would the city be forbidden in law to deny or refuse to pay them for that reason. If the debt to evidence which they were executed was not such a debt as would be binding on the corporation, then no obligation to pay it on the part of defendant ever existed, and no acts of the city officials in paying interest on them could amount to a ratification by the constituents of the corporation, but if the debt be lawfully due, it seems that the principles laid down by Judge Drummond in case Portsmouth Savings Bank *vs.* Springfield, 4 Fed. Reports, 276, may with force
62 be applied to this case. "All questions of doubt in relation to the validity of these bonds should be answered in favor of their legality, because the city has recognized their validity repeatedly and has paid the interest on them for a series of years. Therefore, under such circumstances as these, it should appear, beyond all doubt, that the issue of the bonds was void."

The opinion in the Wilson case shows that the bonds he sued on were given to evidence the purchase price of gas stock which the city's agents had purchased for the corporation.

The plea *ultra vires* was sustained because the court thought there was no authority in the city's agents to purchase "gas stock," and consequently they could not bind the corporation for the debt. If it be true that the corporate authorities were without power to buy gas stock, it could not have been a matter of much consequence to the court in that case whether the bonds sued on are in the form of commercial paper or not. It is evident, from the reasoning of the court, that the corporation would have been liable for the debt incurred in the purchase of the gas stock but for the absence of the power to contract for such stock.

If the court had found that the city's agents were authorized expressly or by implication to bind the corporation for a debt contracted by them for the purchase of gas stock there is nothing
63 in the opinion of the court to induce us to believe that the mere form of the instruments used by the agents to evidence the corporation's promise to pay for the gas stock would have been sufficient to release the corporation from its lawful obligation to pay to the vendor or his assignees the amount due them. The defendant was released in that case on the plea *ultra vires*, because the court substantially said there never was any liability incurred by the acts of the officials in purchasing such property; that there was no obligation sanctioned by law, and no recovery could be had.

But defendant contends that such bonds as these purport on their face to be, when issued for anything or to any person, are void. Conceding it to be true that the corporation had no authority to execute notes or bonds for any purpose which would be entitled judicially to the protection of the law merchant, does it follow that where the city's agents and all the parties to a contract sanctioned by law agree to give *to give* and take such instruments as would be so protected that the instruments so given and now held against defendant are for all purposes void? Will the fact that those agents exceeded their power only in agreeing to give such instruments or exceeded their power only and merely in the selection of the means of evidencing the debt due the contractors invalidate and ex-
64 tinguish the obligation lawfully incurred by the corporation? If no debt sanctioned by the law could be incurred for such public work as the grading and otherwise improving the city's streets, then it would be a matter of no consequence to the city or to the constituents of the corporation what sort of evidence of the debt were issued, for the plea *ultra vires* would shield them against the debt; but the plea, if the debt is lawfully due and unpaid, will not protect the corporation against the payment of the debt because of an irregularity or error on the part of the city's agents in giving commercial notes instead of non-commercial vouchers or warrants. To give such an effect to the plea, whoever may be the parties to the contract or whatever may be the irregularities in the instruments used to evidence a lawful debt, would be as unwarranted in conscience as it would be novel in the administration of justice.

In the Dorian case we held that the bonds are not void and without effect; that if they were not in law entitled to the credit and force of commercial paper they certainly, under the authorities cited, may be treated as evidences of simple obligations in favor of the persons holding them.

When we tried that suit the several suits now submitted had not been presented, the bonds in the Dorian case did not amount
65 to an appealable sum, and it was known that the series of bonds now sued on were outstanding against the city. Under such circumstances I thought it best to rest the court's opinion on the validity of the bonds as evidencing in favor of the *bona fide* holder a simple obligation against defendant.

In that case a written opinion sustaining the validity of the bonds in the way just stated was submitted to Judge Pardee, who certified his concurrence in the reasoning and conclusion therein.

In the Dorian case the plaintiff contended that the corporate authorities, having ample express power to provide, secure, and contract for the public work performed by the contractors to whom the bonds were issued, had also the implied power to issue to them commercial instruments, and that these bonds being of such a character are in themselves a legal basis for recovery—the same point as urged in this case.

Considering that the public work for which it is agreed these bonds were issued was satisfactorily performed, that no equitable relief is sought by defendant, and that all the suits to be covered by

this opinion are for appealable sums, I have less hesitancy now than I had when the Dorian case was tried in taking up and passing on the validity of these bonds as commercial instruments. The authority of defendant's agents to secure and provide for certain
66 public works is found in the express powers of the corporation. Out of those powers come by implication the *the* authority to give promissory notes binding on the corporation. The implied powers, when deducible from the interpretations the law puts upon the meaning or extent of the express powers, are as good authority for the act of an agent as are the express authorizations in the mandate. In this State it has frequently been held that an agent authorized to buy a thing may give his principal's note for the price. See 2 Rob., 244. The court say: "If the power to purchase be established the power to give the evidence necessary to secure the price necessarily ensues, and whether the credit be long or short is a matter of indifference." In 8 Rob. the court holds that the notes given to plaintiff being a contract made by defendant in the course of their legitimate business, no express authority is necessary in the charter to enable them to make it. "The city of Shreveport, having the right to purchase real estate under its charter, had the power, which was an implied one, to execute the note for the credit part of the purchase and to give a vendor's mortgage and vendor's privilege." 26 A., 636.

"The city of Shreveport, having the authority to buy property, carries with — by implication the authority to give notes for
67 the price." 26 A., 495. The several cases applying to defendant city from this State's courts were decided when the charter powers to purchase real estate were the same as they were in the charter existing at the time these bonds were issued, and it cannot be said that the express power to purchase real estate and the implied power of the city's agents to give promissory notes for the purchase price is more clearly expressed or implied in the charter then existing than was the power of the same agents to bind the corporation on such notes for the credit price of work performed or for material furnished for improvements on the streets. The State court in deciding that the city's agents were empowered to bind the corporation on notes given for the purchase price of the thing were authorized to buy or provide for the city were applying well-known rules in the law of principal and agent—that is, that the power to bind the principal by giving his promissory note for the price of the thing which he is expressly authorized to secure or furnish is an implied and incidental power, and if such a power is not prohibited the agent will be considered as possessing it by implication. It is known that the authorities, as well in the
68 Federal as in the State courts, are not uniform in their rulings upon the matter we are considering; this does not exist because of any serious difficulties found in applying the law of agency, but largely upon the question as to whether the law of principal and agent, in a given case, shall be applied in considering the liability of a municipal corporation for the acts of their agents. If the power in the officials of a municipal corporation to do or procure a thing is

sufficient, as in this case, it seems there can be no reason why in fixing the liability of the corporation the law of principal should not be applied. In the two cases, one Britton *vs.* Police Jury, 15 Wal., the other Ray *vs.* Nashville, 19 Wal., the subject-matter of this suit was fully discussed. In the former the plaintiff, a *bona fide* holder of certain bonds, sued upon them as *as* commercial instruments and payment was resisted on the plea *ultra vires*. Justice Bradley, finding no express power in defendant to issue such bonds, said: "We have, therefore, the question directly presented in this case whether the trustees or representative officials of a parish or county or other local jurisdiction, vested with the usual power of administration in specific matters and the power of levying taxes to defray the
69 necessary expenses of the jurisdiction, have an implied authority to issue negotiable securities, payable in the future, of such a character as to be unimpeachable in the hands of *bona fide* holders for the purpose of raising money or funding a previous indebtedness."

The commercial securities in that case were issued for the purpose of "funding previous indebtedness," and the court, not finding any express power to issue the bonds, said to issue commercial securities for such purposes does not belong to the governmental purposes of a parish, and therefore could not be considered as an implied power. The court, in so holding, announced a general principle, which forbids the authorities of municipal corporations possessing only the usual governmental powers, in the absence of express powers, to issue bonds, whether in a commercial form or not, to raise money or to fund outstanding indebtedness under the exercise of implied powers, because to issue bonds for such purposes is not within the scope of a corporation's usual governmental powers; but the court, in order that the principle announced and upon which the bonds were held invalid should not be extended too far, said: "We do not mean to be understood that it requires in all cases express authority for such bodies to issue negotiable
70 paper. The power has frequently been implied from other express powers granted. Thus it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in the future. So the power to subscribe for stock in a railroad or to purchase property for a market-house and other like powers which cannot be carried on without borrowing money or giving obligations payable in the future have been held sufficient to raise the implied power to issue such obligations."

In Ray *vs.* Nashville, 19 Wal., 468, Justice Bradley, delivering the opinion, held that defendant corporation, possessing, as it did, only the governmental powers, could not issue commercial notes or otherwise bind the city for borrowed money, because no such power existed among the implied powers of the corporation; that the power to borrow money was not germain to the powers expressly given and was not a power necessary to carry out the purposes of the city government.

In reading the opinion and conclusion of the court it will

be apparent that it could not have been a matter of consequence to Justice Bradley or to the three justices who agreed with him (in the Ray case) whether the bonds sued on in
71 the Britton case or the drafts or notes in the Ray case were in a commercial or negotiable form or not; for them it seemed to be enough to know that the defendant corporation had no power to issue funds to take up outstanding indebtedness or to borrow money, and could not be bound by the officials to pay it, whatever may have been the sort of instruments used between the parties. In the Ray case the court was composed of eight judges; four of them dissented. Among them was Justice Hunt, whose written opinion is reported, in which he said: "I hold it to be well established by the authorities that a municipal corporation may borrow money for the legitimate use of the corporation, and that it may issue its notes for the same, unless expressly prohibited by its charter or by some statute from doing so. The proposition that it cannot borrow money unless expressly authorized to do so is, in my opinion, unsustained by sound authority;" "that securities thus signed by corporations are subject to the rules of commercial law, when held by *bona fide* holders, has been repeatedly held by this court." Justice Hunt thought Ray was not a *bona fide* holder before maturity, and agreed to have the case remanded for the purpose of letting in equita-
72 ble defenses. On the other issues mentioned the court was evenly divided.

Whatever conflict of opinion there may be among the courts and judges as to the power of the agents of a municipal corporation, possessing only the usual governmental powers to bind their constituents by the issuing of commercial bonds or any other evidences of indebtedness for borrowed money or on bonds issued to take up outstanding indebtedness, we are, after a very — examination of authorities, unable to find a single case in which the power of the city's agents to evidence the credit price of a thing which they were authorized to secure, provide for, or purchase was judicially denied.

In Desmond *vs.* Jefferson, 19 Fed. R., 486, plaintiff sued on bonds issued for the purchase price of a fire engine—alleged them as commercial securities to be a legal basis for recovery. Defendant resisted payment on the plea *ultra vires*. The defendant city possessed the usual governmental powers. Among these powers was the power "to organize a fire department." The court thought the defendant, having the power to organize a fire department, had ample power to buy an engine and give such securities for the pur-
73 chase price, and said: "There is no case to be found where, if the power is given by specific grant or by necessary implication to provide for or buy the thing, the courts have held that this character of paper is not obligatory upon the municipality."

In 1 Wal., 273, the defendant city had power to subscribe to a city railway company "as fully as any individual." The corporation was sued on negotiable bonds issued for subscription to the company and resisted payment on the ground that her agents were not authorized to issue the negotiable bonds. The court said the power to subscribe was a power to create a debt, and consequently to give

evidence of the debt. The power to subscribe in such a way was given, and if they legally owed a debt it followed that they can give a bond for it.

The power in that case was broadly given. So in the pending case it would seem that the power to pass all ordinances not inconsistent with the laws of the State which the city's agents may deem proper in relation to such public works as were performed by the contractors to whom these bonds were given, considered with the fact that the defendant's agents could collect taxes, unlimited in per centum or gross sum, annually for the well regulating of the town,

should, we think, enable the authorities to secure such public
74 works in any way that agents are usually empowered to act for their principals. The weight of authorities upon the power of a municipal corporation to execute bonds to be placed on the market for the purpose of raising money to be expended by the city's agents or for the purpose of funding outstanding indebtedness seems to — generally against the exercise of the power, except in cases where the power is derived from legislative authority, expressed or implied. The reason for such ruling is well known to be in the fact that municipal corporations are established to enable the people residing in towns and cities to have the benefits of local government. Unlike trading or business corporations, their powers, unless otherwise directed by express or implied grant, should be and are in law, as well as in public policy, limited to such as are gover-mental or administrative in their nature or scope—to such as are necessary to conserve the purposes of their municipal organism.

So far as the contractors to whom these bonds were originally given are concerned with their issue, it cannot be said that they were issued for the purpose of borrowing money or for the purpose of funding outstanding indebtedness of the city, for it is not denied

that they were given to the contractors in pursuance of an
75 agreement to the effect that one-half of the amount due them for the public work should be paid in cash and the balance should be evidenced as a debt against the city by ten-year negotiable bonds, some of which are now held by plaintiff. The contractors agreed to take commercial bonds or securities, and as such securities are known to be more valuable in commerce than instruments not protected by commercial law, it may be fairly presumed that the fact that such bonds were to be given to them instead of non-commercial securities enabled the contractors to perform the work, and entered largely, if not in a controlling way, into their ability, motive, and reason for undertaking the public works. If it be conceded that the city's agents had power to incur a debt sanctioned by law against the corporation for such works as the contractors in this instance faithfully furnished and performed, it does not seem inconsistent with public policy nor at variance with the jurisprudence of Louisiana or the decisions of the United States courts to hold that such authorities or agents are authorized in the implied powers of their mandate to evidence such a debt by giving such commercial notes or bonds as are now held by plaintiff. In reaching our conclusion in the Dorian case, as well as in this suit, we

have kept in mind the rule which seems to be generally ob-
76 served when the Federal courts are employed in interpreting the powers of municipal corporations to lawfully incur a debt—that is, that doubts, if there be any, as to the power of the city's agents to incur the particular debt should be charged to the obligee, as in this case the plaintiff.

But in deciding now in favor of the validity of these bonds as commercial securities it cannot be said that we are imposing upon or enforcing against the constituents of the corporation a debt doubtful in its origin, or one not lawfully incurred, or one not justly due to somebody, because it is clear enough that the debt is unpaid and that the city's agents had ample power to ordain and direct that the public work should be done, and to legally bind the corporation for the debt—that is, for the price of the public work.

(Sig.) ALECK BOARMAN, *Judge.*

77 *Minutes of Court.*

UNITED STATES OF AMERICA, *Western District of Louisiana:*

This being the third Monday of the month of July, A. D. 1886, and by law the first day of the July term of the circuit court of the United States for the fifth judicial circuit and western district of Louisiana, the same was duly opened by the marshal.

Present: His honor Aleck Boarman, judge, presiding.

JOHN R. HOLMES
vs.
THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107.

Motion for recusation filed & same assigned for argument on Tuesday, July 20th, 1886, in all these cases, from 104 to 112.

THURSDAY, *July 29th*, 1886.

Court met pursuant to adjournment.

JOHN R. HOLMES
vs.
THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107.

On motion of T. Alexander, attorney for defendant, the motion filed in the above-named cases on Monday, July 19th, 1886, be, and the same are hereby, withdrawn. Agreement of counsel filed in these cases and made part of the record.

FRIDAY, *July 30th*, 1886.

Court met pursuant to adjournment.

JOHN R. HOLMES
vs.
THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107. Consolidated.

Answer & plea of prescription filed.

78 UNITED STATES OF AMERICA,
Western District of Louisiana:

SHREVEPORT, MONDAY, *February* 21*st*, 1887.

This being the third Monday of the month of February, A. D. 1887, and by law the first day of the February term of the circuit court of the United States for the fifth judicial circuit, western district of Louisiana, the same was duly opened by the marshal.

Present: His honor Aleck Boarman, judge, presiding.

WEDNESDAY, *March* 2*nd*, 1887.

Court met pursuant to adjournment.

J. R. HOLMES
vs.
THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107. Consolidated.

These cases, as per assignment, came on to be heard. A jury having been waived and both sides having announced themselves ready for trial, the cases were proceeded with.

Note of Evidence.

Plaintiff offers in evidence—

1st. All the evidence offered on the trial of the case Simon Levy *vs.* The City of Shreveport.

2nd. Acts of the Legislature of Louisiana relative to the city of Shreveport, viz: Acts of 1839, page 200; acts 1850, acts 1853, page 198; acts 1859, page 121; acts 1866.

3rd. Ordinance of the city of Shreveport, of date July 3rd, 1866.

79 & 80 4th. Ordinance of the city of Shreveport, of date April 4th, 1871.

5th. Forty-two (42) bonds of the city of Shreveport.

6th. Note of evidence taken on the trial of the case Simon Levy *vs.* The City of Shreveport, filed February 24th, 1885.

Testimony closed and case submitted.

MONDAY, *March* 7*th*, 1887.

Court met pursuant to adjournment.

J. R. HOLMES
vs.
THE CITY OF SHREVEPORT. } Nos. 104, 105, 106, 107. Consolidated.

It is ordered by the court that there be judgment in favor of the plaintiff, J. R. Holmes, against the defendant, The City of Shreveport, for amounts claimed in petitions, & interest.

81 *Clerk's Certificate.*

CLERK'S OFFICE.

I, John W. Wheaton, clerk of the circuit court of the United States for the fifth circuit and western district of Louisiana, do hereby certify that the foregoing 80 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial in the cases of John R. Holmes *vs.* The City of Shreveport, Nos. 104, 105, 106, & 107 (consolidated) of the docket of the said court.

Returned in obedience to writ of error, the original of which is hereto annexed.

Witness my hand and the seal of said court, at the city of Shreveport, this 23rd day of May, A. D. 1887.

[Seal of U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clerk.*

Judge's Certificate.

I, Aleck Boarman, — United States for the western district of Louisiana, do certify that John W. Wheaton, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and western district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

82 Given under my hand, at the city of Shreveport, in said district, this 23rd day of May, A. D. 1887.

ALECK BOARMAN, *Judge.*

Clerk's Certificate.

I, John W. Wheaton, clerk of the circuit court of the United States for the fifth circuit and western district of Louisiana, do hereby certify that Aleck Boarman, whose name is signed to the foregoing certificate as United States judge for the western district of Louisiana, was at the time of signing said certificate and is now the judge of said court.

Witness my hand and the seal of said court, at the city of Shreveport, this 23rd day of May, A. D. 1887.

[Seal of U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clerk.*

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the fifth circuit, western district of Louisiana, Greeting:

Because that in the records & process, and also in the rendering of judgment in a suit before you or some of you, between the City of Shreveport, Louisiana, plaintiff in error, and John R. Holmes, a citizen of the State of Texas, defendant, a manifest error has inter-

vened, to the great damage of the said plaintiff in error, as in his complaint stated, and as it is just & proper that the error, if any there be, should be corrected in due manner and that full & speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then,
84 under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, being present seat of the National Government, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, at Washington aforesaid, this the 14th day of March, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred & eleventh.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clerk.*

85 [Endorsed:] No-. 104, 105, 106, & 107, consolidated. City of Shreveport *vs.* Jno. R. Holmes. Writ of error. Filed March 14, '87. 16. J. W. Wheaton, cl'k.

Endorsed on cover: W. Louisiana C. C. U. S. No. 1121. The City of Shreveport, Louisiana, plaintiff in error, *vs.* John R. Holmes. Filed October 7, 1887.